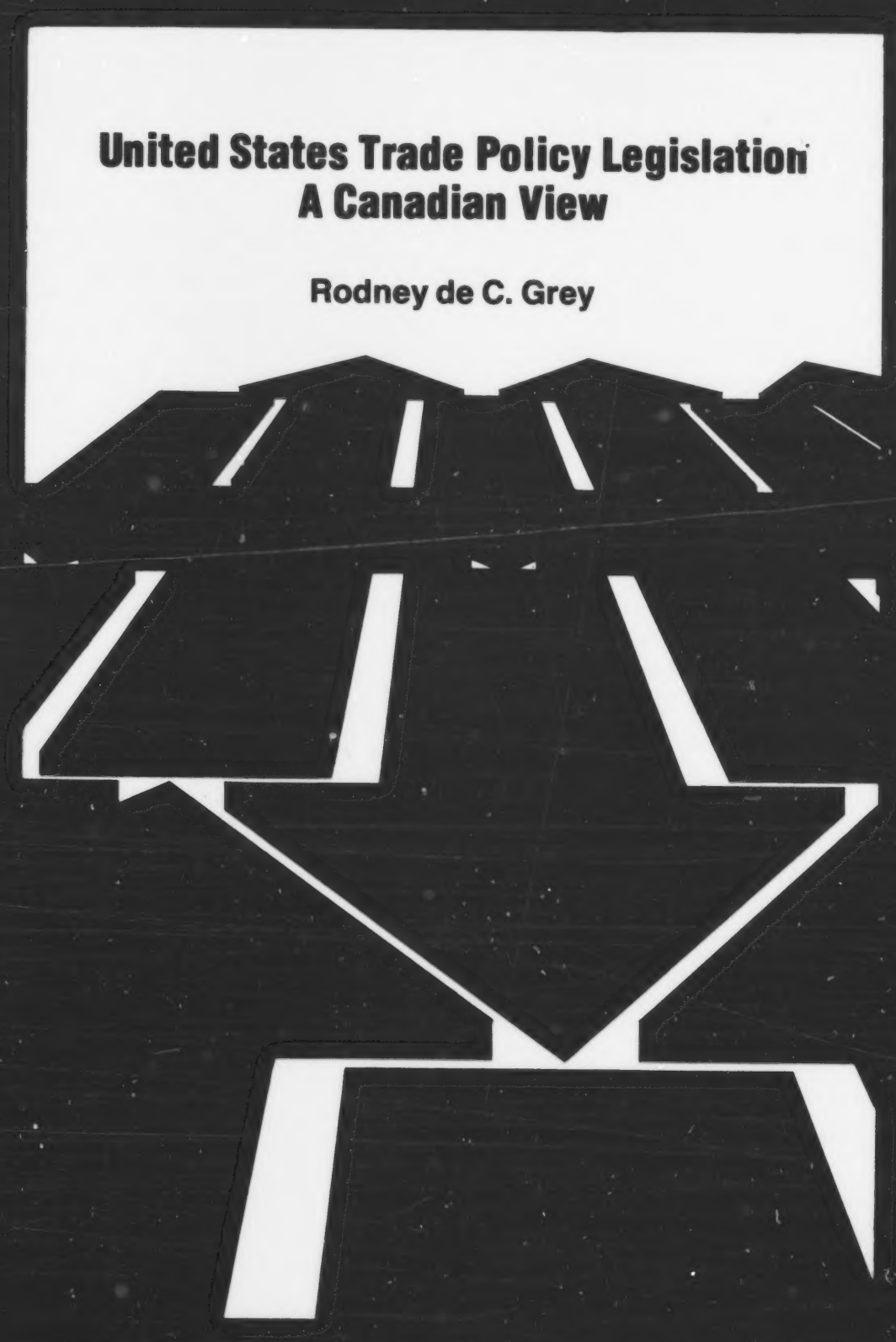
United States Trade Policy Legislation
A Canadian View

Rodney de C. Grey



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A Canadian View

by
Rodney de C. Grey

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Foreword

No country conducts a larger share of its internationaal trade with the United States than does Canada. For this reason, and because of the overwhelming influence on Canada of U.S. approaches to law, administrative practices, and ideologies, the evolution of U.S. trade law is of particular importance to Canadians. What our access to U.S. markets will be over the next decade, whether Canadian or third country investors will choose to establish facilities in the United States rather than investing in, and exporting from, Canada, and what American official or private-sector representatives might seek from Canada as part of the ongoing relationship between the two countries are amongst the major issues currently facing Canadian policy makers.

The Institute is fortunate in having been able to draw on the knowledge and experience of an internationally recognized Canadian to address these and other issues. Rodney de C. Grey devoted some twenty-five years to the development and execution of Canadian trade policy, and dominated the Canadian scene for at least the past ten years in his capacity, first, as the Assistant Deputy Minister in the federal Department of Finance responsible for international trade policy, and later as Canadian Ambassador and Head of Delegation to the Tokyo Round negotiations in Geneva throughout the second half of the 1970s. In recent years Mr. Grey has shared his experience and thoughts with a larger public in an attempt to stimulate new ideas and a wider interest in Canadian international economic relations. This objective is also that of the Institute's International Economics Program.

The study that follows describes briefly the evolution of U.S. trade policy and focuses particularly on newer U.S. policies and administrative practices concerning imports into that country. As such, it examines some of the finer details of American law and reviews many recent cases as examples of the application of the new U.S. international legal system. It will be a most useful handbook for any exporter, including those from outside Canada, wishing to penetrate the American market as well as for those lawyers and others who advise

on trade with the largest single trading nation in the world economy. Teachers and students of international trade and of international trade law will benefit from the author's analysis and description as will officials in both international organizations and national governments who will find the study helpful as they develop appropriate practices and legislation to deal with current U.S. policies in this area.

Gordon Robertson
President
August 1982

Avant-propos

Le Canada est le pays dont la part du commerce international avec les États-Unis est la plus importante. Pour cette raison, et aussi à cause de l'influence profonde sur le Canada des approches américaines du droit, des pratiques administratives et des idéologies, l'évolution de la loi commerciale américaine importe tout particulièrement aux Canadiens. Ce que sera notre accès au marché américain au cours de la prochaine décennie, si les investisseurs canadiens ou du Tiers monde choisiront de construire leurs installations aux États-Unis plutôt que d'investir au Canada et d'en expédier leurs exportations, et ce que les représentants des secteurs public ou privé américains pourront exiger du Canada dans le cadre de la relation permanente entre les deux pays, voilà certaines des grandes questions auxquelles font face les décideurs canadiens.

L'Institut se félicite d'avoir pu puiser à même les connaissances et l'expérience d'un Canadien de réputation internationale pour se pencher sur ces questions et d'autres encore. Rodney de C. Grey a consacré quelque vingt-cinq années à l'élaboration et à la mise en oeuvre de la politique commerciale canadienne et a dominé la scène canadienne depuis au moins dix ans en sa qualité tout d'abord de sous-ministre adjoint responsable de la politique commerciale internationale au ministère fédéral des Finances, et ensuite comme ambassadeur canadien et chef de la délégation aux négociations de la Ronde Tokyo à Genève au cours de la deuxième moitié des années 1970. Ces dernières années, M. Grey a partagé son expérience et ses réflexions avec un public plus vaste dans le but de susciter de nouvelles idées sur les relations économiques internationales du Canada et d'aviver l'intérêt envers ce domaine. Cet objectif est également celui du programme sur l'économie internationale de l'Institut.

L'étude qui suit décrit brièvement l'évolution de la politique commerciale américaine et s'attache en particulier aux dernières mesures et aux plus récentes pratiques administratives des États-Unis relativement aux importations vers ce pays. À ce titre, on examine certains des détails de la loi américaine tout en recensant

plusieurs causes récentes comme exemples de l'application du nouveau régime juridique international américain. Ce volume constituera un manuel fort utile pour tout exportateur, y compris ceux de l'extérieur du Canada, désirant pénétrer le marché américain ainsi que pour les avocats ou autres qui dispensent des conseils sur la manière de transiger avec le plus grand pays commerçant de l'économie mondiale. Professeurs et étudiants du commerce et du droit commercial internationaux profiteront de l'analyse et de la description de l'auteur, de même que les fonctionnaires d'organismes internationaux et de gouvernements nationaux, qui pourront s'en inspirer pour élaborer des pratiques et des lois pertinentes en vue de réagir à l'actuelle politique américaine en ce domaine.

Gordon Robertson
Président
Août 1982

The Author

Rodney de C. Grey is a consultant on trade policy and part-time special adviser to the Government of Ontario. He is a graduate of Queen's University, the University of Toronto, and the University of London, where he obtained a doctorate in 1953.

Dr. Grey returned to Canada in 1953 to become Executive Assistant to the Minister of Finance, and later he joined the Department. In 1955, he was appointed Canadian Representative to the GATT Tariff Negotiations Working Party. He was a member of the Canadian Delegation to the "Dillon Round" of negotiations in 1960–1962 and became Head of the Negotiating Team in Geneva. In 1963, he chaired the GATT Committee that planned the "Kennedy Round," and during that negotiation he represented Canada in the group that worked out the Anti-dumping Code. During this period he was Chairman of the Interdepartmental Committee on Low-Cost Imports Policy and for a number of years was the Canadian negotiator for such matters. He was also heavily involved in the negotiations of the Canada/United States Automotive Products Agreement.

In 1965, Dr. Grey was named Director, International Economic Relations, Department of Finance, and in 1967, Assistant Deputy Minister, in charge of the Tariffs, Trade and Aid Branch. In 1965, he was appointed Head of the Canadian Delegation to the "Tokyo Round" with the rank of Ambassador. At the conclusion of that negotiation in 1979, he resigned from the federal public service.

Rodney Grey is the author of a number of articles on federal/provincial financial relations, on trade policy, and of a study on the Canadian anti-dumping system. More recently he has been directing his attention to the trade relations aspects of tax policies and practices.

Summary

United States trade legislation was substantially revised in the late 1970s by the passage of the Trade Agreements Act. This act takes into U.S. domestic law the rights and obligations arising from the Multilateral Trade Negotiations (Tokyo Round), which were completed in July 1979. It will, in combination with U.S. regulations, Statements of Administrative Action, and House and Senate Records and Committee Reports, influence greatly other countries' legislation and trade practices over the next decade. Nowhere is this truer than in the case of Canada, the United States' principal trading partner, where import policy and legislation are currently under revision and public debate.

In order to provide a perspective within which to examine the major components of the revised U.S. trade system, this study in its early chapters reviews briefly elements of U.S. international economic policy dating back to the enactment of the duty regarding reports of subsidized sugar in 1890 as well as of the U.S. legal environment. It points out in particular the view increasingly subscribed to by U.S. policy makers, both in the executive and legislative branches, that U.S. producers have needed better protection against "unfair" foreign competition, albeit within the framework of the GATT, which the United States has continued to support strongly. Further, the study emphasizes the critical importance of the concept of "injury" to domestic producers and how both the definition and the application of the injury concept vary depending on whether imports into the United States are deemed to be the result of "fair" or of "unfair" competition. The gradual shift in the U.S. trade system from a tariff-based system of protection to one of "contingency" or stand-by protection is also stressed. To the extent that the regulatory instruments of government are replacing a system by which relative prices determine the pattern and volume of international trade, the study suggests that the risk of administered trade and international market-sharing arrangements is increasing.

With respect to the U.S. legal environment in which the new American trade law has evolved, four factors are stressed. Of great

importance are the constitutional "separation of powers" and the dominant role of Congress concerning U.S. commercial policy, particularly at a time when many in Congress have felt that successive administrations have not been vigilant enough in protecting U.S. domestic producers. In addition, the extraordinary degree of detail in U.S. statutes and regulatory provisions concerning procedure is noteworthy as is the importance of legislative history in interpreting U.S. trade law. A pervasive concern for the protection of private rights also characterizes American law in this area as in others.

The main components of the U.S. trade system, including escape clause actions, anti-dumping and countervailing duties, provisions dealing with other "unfair" methods of import competition, and the new customs valuation system, are then examined in considerable detail in the following chapters.

With respect to escape clause or "safeguard" action, which is in response to "fair" competition, and anti-dumping and countervail provisions, which are in response to "unfair" action, the point is made that while many of the procedures are the same, import relief is much more automatic in the latter case. That is, the finding of injury, as defined in U.S. law and particularly in practice, and the application of remedies to offset the injury, is more certain in anti-dumping and countervail cases than it is when escape clause actions are involved.

The study emphasizes that even escape clause actions, directed at imports causing injury to U.S. producers by fair competition, can hold significant danger for Canada as our exports can get caught up in punitive steps relating entirely to imports from other countries. In addition, given the role of transfer pricing within the context of multinationals operating in the United States and Canada, the use of subsidies particularly in Canada for regional development objectives, the adoption by the United States of a regional as well as a national injury standard, and the continuing uncertainties concerning the toughness of the U.S. test for injury, it is argued that the possibility of serious negative effects on Canadian exports due to U.S. anti-dumping or countervail actions will be even greater in coming years. While the scope, as outlined in current Canadian government proposals for a revised import policy, exists for Canada to temper or offset some adverse U.S. trade actions, the basic asymmetry in the size of the two economies provides a definite limit to what Canada can effectively do.

Following examination and review of other components of the U.S. system, including section 337 of the Tariff Act (referring primarily to patent infringement), section 301 of the Trade Act (addressing unfair trade practices of other governments), the new customs valuation system, as well as provisions concerning product standards and procurement, the study concludes by stating that the new U.S. system, now being copied with some variation by Canada, is not necessarily

less restrictive of trade than the older system of legally bound tariffs, which were the primary means of import protection.

Abrégé

L'adoption du *Trade Agreements Act*, vers la fin des années 1970, a modifié sensiblement la législation commerciale américaine. Cette loi intègre à la loi intérieure des États-Unis les droits et obligations découlant des négociations commerciales multilatérales (Ronde Tokyo) qui se sont terminées en juillet 1979. De concert avec les règlements américains, les *Statements of Administrative Action* et les *House and Senate Records and Committee Reports*, elle influencera fortement les lois et les pratiques commerciales des autres pays au cours de la prochaine décennie. Cela vaut particulièrement pour le Canada, le principa partenaire commercial des États-Unis, qui procède actuellement à une révision et à une discussion publique de sa politique et de sa loi en matière d'importation.

Afin de situer l'étude des principales composantes du régime commercial révisé des États-Unis, les premiers chapitres de ce volume retracent certains éléments de la politique économique internationale des États-Unis depuis l'adoption de tarifs douaniers en 1890, suite à des rapports indiquant que le sucre était subventionné, et présente certains éléments du milieu juridique américain. On y souligne en particulier le point de vue qu'adoptent de plus en plus les décideurs américains, tant dans les organes exécutifs que législatifs, voulant que les producteurs américains doivent être mieux protégés contre une concurrence « injuste » en provenance de l'étranger, sans toutefois outrepasser le cadre du GATT, que les États-Unis continuent à appuyer fortement. En outre, l'étude insiste sur l'importance critique du concept de « préjudice » aux producteurs nationaux, et sur la manière dont la définition et l'application du concept de préjudice varient selon que l'on juge que les importations aux États-Unis sont le résultat d'une concurrence « juste » ou « injuste ». On met également l'accent sur le passage graduel d'un régime de protection commerciale axée sur les tarifs à un régime de secours ou de relève. Dans la mesure où les outils de réglementation de l'État remplacent un régime en vertu duquel les prix relatifs déterminent la configuration et l'ampleur du commerce international, l'étude laisse entendre que l'on court de plus en plus le risque de voir intervenir des accords sur

l'administration du commerce et sur le partage international des marchés.

En ce qui a trait au milieu juridique américain qui a donné lieu à la nouvelle loi commerciale, on met en relief quatre facteurs. La « séparation des pouvoirs » inscrite dans la constitution et le rôle dominant du Congrès en matière de politique commerciale, surtout au moment où de nombreux représentants croient que les administrations antérieures n'ont pas manifesté assez de zèle dans la protection des producteurs américains, sont de toute première importance. En outre, il ne faut pas négliger la quantité extraordinaire de détails de procédure que renferment les lois et règlements américains ainsi que l'importance de l'histoire législative dans l'interprétation de la loi commerciale américaine. Dans ce domaine et les autres, la loi américaine se caractérise par un souci permanent de protéger les droits privés.

On passe ensuite à un examen fort détaillé des principales composantes du régime commercial américain, y compris les recours aux clauses de sauvegarde, les tarifs antidumping et compensatoires, les dispositions visant les autres méthodes « injustes » de concurrence en matière d'importation et le nouveau régime d'évaluation douanière.

En ce qui a trait aux clauses échappatoires ou aux procédures de « sauvegarde », qui sont des réactions à la concurrence « juste », et aux dispositions antidumping et compensatoires, qui sont une réaction à la concurrence « injuste », on indique que, même si plusieurs des procédures sont identiques, l'aide est beaucoup plus automatique dans le second cas. C'est-à-dire que la détermination du préjudice, tel qu'il est défini dans le droit et particulièrement dans la pratique des États-Unis, et l'application de remèdes pour compenser le préjudice se font de façon beaucoup plus certaine dans les cas antidumping et compensatoires que dans les cas où interviennent les clauses de sauvegarde.

L'étude fait bien remarquer que même les actions en vertu des clauses de sauvegarde visant les importations causant préjudice aux producteurs américains par une juste concurrence peuvent représenter un danger d'importance pour le Canada puisque nos exportations peuvent être affectées par des mesures punitives adoptées à l'intention d'importations venant d'autres pays. En outre, compte tenu des transferts des prix pratiqués par les multinationales opérant au Canada et aux États-Unis, du recours aux subventions pour le développement régional, particulièrement au Canada, de l'adoption par les États-Unis de normes tant régionales que nationales en matière de préjudice et des incertitudes permanentes quant à la rigidité du concept américain de préjudice, on soutient que la possibilité de graves effets négatifs sur les exportations canadiennes découlant d'actions américaines antidumping ou compensatoires s'ac-

centuera dans les années à venir. Bien que le Canada puisse songer, comme le laissent entendre les projets actuels de révision de la politique en matière d'exportation du gouvernement canadien, à tempérer ou à pallier certaines actions commerciales négatives des États-Unis, l'asymétrie fondamentale de la taille des deux économies impose des limites très certaines à ce que le Canada peut réellement faire.

Suite à une recension et à un examen des autres composantes du régime américain, y compris l'article 337 du *Tariff Act* (qui traite avant tout des atteintes aux brevets), l'article 301 du *Trade Act* (qui vise les pratiques commerciales injustes des autres gouvernements), le nouveau régime d'évaluation douanière ainsi que les dispositions visant les normes et l'acquisition des produits, l'étude conclut que le nouveau régime américain, que le Canada imite avec certaines modifications, ne limite pas nécessairement moins le commerce que l'ancien régime de tarifs inscrits dans la loi, qui constituaient le principal moyen de protéger les importations.

Introduction

Canadian trade policy and Canadian trade interests, and their reflection in our trade policy legislation, are profoundly influenced by United States policy and accompanying trade legislation. That legislative system has now been recast, in order to take into U.S. domestic law the rights and obligations negotiated for in the "Tokyo Round" (the Multilateral Trade Negotiations) that concluded in July 1979.

The premise of this study is that the most significant set of norms and rules of definition and detail affecting the trade relations of Canada with the United States and, indeed, with other countries will be this revised U.S. trade relations legislative system, as set out in the Trade Act of 1974 and the Trade Agreements Act of 1979. That legal structure governs imports into the United States and thus provides the legal framework in which Americans may assert their rights regarding import competition. Although the focus is on imports, there are also provisions regarding the rights of Americans in export markets. It is clear that the new U.S. system is having and will have a profound influence on how other countries, such as Canada, take into their domestic law the obligations and the rights they negotiated for in the Tokyo Round.

The overall impact on Canada will be on the structure, the style, and much of the detail of Canadian trade relations legislation — particularly in the federal government's proposed Special Import Measures Act and in the proposed custom valuation provisions. It will also be reflected directly, and indirectly, in decisions to export to the United States, or to build facilities in Canada for the production of goods to be exported.

One example will show how this influence works. The findings of the U.S. International Trade Commission as to what kind and measure of impact on domestic producers is deemed to be "injury" — this word having been used in the Tokyo Round agreements on the use of anti-dumping duties and of countervailing duties, and in the "safeguard" article of the General Agreement on Tariffs and Trade (GATT) (Article XIX) — will have an important effect on how this

concept is addressed in Canadian anti-dumping, countervailing duty, and "safeguard" cases. Producers in Canada, including their trade associations and their legal advisers, perhaps drafting a complaint about dumping or export subsidization, or seeking some restriction on imports, or importers defending themselves against such a complaint, will look to U.S. practices and decisions on such matters for precedents or for arguments to advance their interests. The quantitative importance of the United States in world trade and in Canada's trade, and the leadership that the United States has given since the mid-1930s in initiating the negotiation of solutions to problems in trade policy, gives U.S. practice its particular relevance. It is thus important for Canadians to look to how the United States implements an international agreement when considering the Canadian laws implementing these same agreements.

This study focuses on the provisions for dealing with "fair" and then with "unfair" competition. The latter set of provisions is the centrepiece of the U.S. system as it has evolved from the passing of President Kennedy's Trade Expansion Act in 1962 to the present. Other aspects of the U.S. system are commented on in much less detail; some of them are only briefly mentioned. A detailed review of all the elements of the U.S. system of trade relations legislation would require a volume several times the size of this study, perhaps several such volumes. These are matters of great detail, and it is easy to be overwhelmed by the sheer volume of legal drafting and of procedural notices and determinations. For that reason, the focus in this study is on the central mechanisms.

The objective is to show in specific terms how this trade law system is affecting Canada and how it bears on Canadian interests. For that reason too, the study is selective. It begins with some comments on some of the policy preconceptions that are particularly relevant to the new U.S. legislation. There then follow comments on the legal environment in which this highly complex system has been evolving. The "escape clause" — the provisions dealing with "fair" import competition — is considered, and there are notes on some cases involving Canadian exports. Following that, there is a more extensive discussion of the measures regarding "unfair" import competition: anti-dumping, countervail, section 337 of the Tariff Act, which is a sort of "catch-all," and section 301, which is addressed to "unfair trade practices" of other governments. There is a short note on customs valuation, and on Canadian problems with the new agreement. These problems are important because Canada is being required to make a complete revision of its valuation provisions, which have been a central element in the Canadian commercial policy system. This process has begun with the referral of the draft law to the Tariff Board and its recent report to the minister of finance. The concluding section

refers briefly to some other aspects of the U.S. system, such as the new provisions regarding procurement. There is a brief summary and statement of conclusions. However, it is important to realize that the impact on Canada is examined in regard to the specific provisions in the U.S. system, rather than being treated as a separate section of the study, and that therefore the "conclusions" of the study appear at various points throughout the analysis.

One comment is required as to nomenclature. It was customary in the Tokyo Round and, indeed, since then, to speak of the negotiations as falling into two categories: those on "tariffs" and those on "non-tariff barriers." The latter term refers to quotas, product standards, anti-dumping duties, countervailing duties, valuation, indeed, all devices or measures other than rates of duty. This classification is not very helpful and is not relied on in this study. A more rational classification would be to consider first, tariffs (and the valuation base to which *ad valorem* rates applied), and other *price barriers* at the frontier, such as anti-dumping duties and countervailing duties; secondly, *non-price barriers* at the frontier, such as quotas; then those barriers, such as procurement restrictions, *which do not operate at the frontier* but which are part of the commercial policy system; and, finally, those other barriers that are not formally part of the overt commercial policy system, but that can be used, intentionally or accidentally, to restrict trade. This category includes product standards, health of animals provisions, and pure food laws. If this classification of barriers, or nomenclature, is kept in mind, the organization of the material in this study will seem more logical than if it is addressed only with the customary division between "tariffs" and "non-tariffs."

United States Policy Perceptions

1

The focus of this chapter is to consider particular perceptions that guided policy makers in the rewriting of U.S. trade relations legislation, first, in the Trade Act of 1974, which was the mandate for U.S. negotiations in the Multilateral Trade Negotiations, and then to follow these policy elements through into their detailed manifestation in the Trade Agreements Act of 1979, in which the United States implemented its Tokyo Round obligations, and finally to consider the impact of these developments on Canadian trade relations legislation.

The chapter does not attempt to describe in any comprehensive sense the total policy framework within which recent U.S. trade relations legislation has been formulated. To do so would be a very extensive task, and an unnecessary one. The evolution of the United States Reciprocal Trade Agreements Program and of the complex of bilateral trade agreements in the middle 1930s; the attempts to create an international trade-relations regulating organization to parallel the International Monetary Fund and the World Bank; the interim arrangement called the General Agreement on Tariffs and Trade (GATT) and its evolution into a set of detailed rules; the central role of the concept of non-discrimination and the unconditional most-favoured-nation clause — all these, for the purposes of this study, are taken as given. There is an extensive literature covering these topics elsewhere.[1] Nor is it feasible to discuss the impact over time of U.S. trade relations policy, critical as that has been, in the development of Canadian policy, and necessary as it certainly is to understand Canadian policy.

The purpose of this short chapter is rather to comment on certain specific perceptions or preoccupations of U.S. policy makers that have become of particular relevance within the framework of the GATT and the post-war system. These perceptions are first, the concern to provide better protection for U.S. producers against "unfair" import competition; secondly, the consequent focus on the concept of injury (to producers or to an industry in the United States) as central to trade relations law; and, thirdly, of broad and general impact, the switch in the emphasis or balance in the U.S. commercial policy system from the

provision of protection mainly by a structure of tariff rates, to the provision of protection by a complex system of "contingency" measures or measures affording "stand-by" protection.

Leaving aside for the moment such issues as the infringement of patent rights by importation, and the improper use of trademarks, marks of origin or of designs, which are usually not considered as central to commercial policy, attempts by the United States to regulate "unfair" import competition with devices other than the tariff can be said to have begun with the enactment of the countervailing duty regarding imports of subsidized sugar in 1890. Later, the Tariff Act of 1897 made provision for countervailing duties on any *dutiable* imports that had been subsidized. The measure was restricted to dutiable imports because it was held that the prime purpose of a foreign export subsidy must be to offset the U.S. protective tariff. It was thought to be "unfair" that domestic producers should have to compete with the Treasury of a foreign government rather than only with private producers. The countervailing duty provisions, until 1974, were based on this policy perception.

In 1921, the U.S. Congress enacted an anti-dumping system, modelled on the Canadian system of 1904, to supplement or supplant an earlier system legislated in 1916. These two pieces of legislation — anti-dumping and countervail — were revised, of course, from time to time. The Trade Act of 1974 involved a major rewriting.

In that 1974 act, the amendments to these provisions were grouped together in title III: "Relief from Unfair Import Practices." As well as amending the Anti-dumping Act of 1921, and the countervailing duty provisions, it provided authority to deal with the following "unfair" practices:

1. "Unjustifiable" or "unreasonable" tariff or other import restrictions that impair commitments made to the United States (i.e., actions that nullify or impair a concession or benefit under the GATT)
2. "Unjustifiable" or "unreasonable" acts or policies that "burden or restrict" U.S. commerce
3. Subsidies that reduce U.S. exports
4. Restrictions on access to supplies
5. "Unfair methods of competition and unfair acts in the importation of articles . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States . . . or to restrain or monopolize trade and commerce in the United States" — such methods and acts were declared "unlawful" and "when found . . . to exist shall be dealt with. . . ." This involved a major extension of the existing section 337 of the Tariff Act of 1930.

The drafting of this title reflected the congressional view that the existing provisions in U.S. law providing for remedies against "unfair" import competition were not being adequately administered by the Treasury, and thus not giving adequate protection to U.S. producers. In Congress it was also believed that other countries were equipped with a variety of trade-restricting provisions and export promotion techniques that were essentially "unfair," and that the United States was inadequately equipped to react to them.

The central concept of all these provisions providing for remedies against import competition is the concept of *injury*. This concept is, of course, one of the central concepts of the GATT, particularly in Articles VI and XIX. One could say that there is a structure or framework in which the injury concept works: there has to be "serious" injury found if "safeguard" action is to be taken (in U.S. terminology, an "escape clause" action) but a showing only of "material" injury to justify action against dumped or subsidized imports. One can visualize a sort of continuum or progression. At one extremity there is that degree of impact which is *de minimis*, that is, that does not warrant the use of the legal apparatus, following the general principle that the law does not concern itself with trifles. Then there is, at an undetermined further point, and moving in the direction of a greater degree of injury, that degree of injury which is "material" in the sense of Article VI of the GATT. Further along, there is that degree of injury which is "serious." How much greater is "serious" injury than "material" injury? The provisions of Article XIX of the GATT, compared to those of Article VI, seem to assume that there is a significant difference between the two.[2]

The implications of the fact that the word "injury" is used in a different sense in section 201 (the escape clause) than it is now used in relation to anti-dumping duties and countervailing duties in U.S. practice will be discussed below in relation to the concept of "cause."

The third important concept is what may be called "contingent" protection. As has been noted above, there has been a substantial development of the legislative provisions providing for relief from "unfair" import competition. In parallel, there has been an expansion of the provisions for relief from "fair" import competition. At the same time, under the broad umbrella of the "Multi-Fibre Arrangement," imports into the United States, as in other industrial countries, of a wide range of textiles and textile products from a number of countries have been brought under quantitative control or regulation. In this product area, the United States has opted for a policy of what might be called "administered trade," or "market sharing," and has abandoned any notion that for trade in this product sector the tariff is to be the sole regulator of imports. In the trade in steel products, the United States chose to apply for a time, and more recently applied for a second

period, a system of "trigger prices" that can be considered to be a system of administered minimum import prices or price understandings operating under the threat of anti-dumping action. And as the product-specific Tokyo Round agreements make clear, for certain agricultural products (cheese, other dairy products, and bovine meat), imports are also to be regulated quantitatively.

Accordingly, one can argue that in terms of the balance in the system, the United States has now moved a considerable distance away from a classic, tariff-centred commercial policy system and toward a system in which "contingency" policy instruments — that is, measures of "stand-by protection" or techniques of administered trade — are to be the effective centre of the system. Indeed, it is beyond argument that the acute problems of providing import protection are not dealt with by the tariff-rate structure, but by these other regulatory devices.

The emphasis began to shift, in a meaningful and substantial sense, with the development of the Short-Term Arrangement on Cotton Textiles (later, the Long-Term Arrangement) and the increasing recourse to anti-dumping provisions in the period before the Kennedy Round. The efforts made during the Kennedy Round to limit the ability of U.S. producers to harass imports by invoking anti-dumping provisions was, in itself, a recognition that contingent protection was becoming more important. The subsequent controversy in Congress over the Anti-dumping Code merely underlined the importance that Congress attached to the integrity of the U.S. anti-dumping system. The shift became clearer with the amendments in the 1974 Trade Act to section 337, noted above, and with the substantial revision of the escape clause. The theme was reiterated in Congress during the Tokyo Round, with the hearings on unfair trade practices by the Trade Sub-Committee of the House Committee on Ways and Means,[3] which revealed a growing interest in these topics in the business community. The great detail to be found in the provisions regarding procedures and time limits, as set forth in the new anti-dumping and countervailing duties provisions in the Trade Agreements Act, further attests to the emphasis placed by Congress on the efficient working of these contingency systems. As Senator Ribicoff observed:

> [The Trade Agreements Act] will also completely revise the countervailing duty and anti-dumping laws to provide *quick and certain relief* for domestic industries which are injured by dumped or subsidized imports[4] (emphasis added).

This move to contingent and/or administered protection is a major evolution in policy; its importance can be assessed when one recalls the different philosophy that guided U.S. negotiators in earlier negotiations under the GATT. One can extrapolate from the GATT

text, and from the conduct of the earlier negotiations, that the commercial policy system envisaged by the policy makers of the industrialized nations around the North Atlantic was to be one in which, in the normal case, protection was to be afforded to domestic producers only by a tariff rate. Under the aegis of the GATT, the rate would be negotiated down and "bound" against increase. Of course, it was accepted that there were cases other than the normal case, particularly in agricultural trade, where many countries used quantitative measures, and later, variable levies, rather than fixed price barriers at the frontier.

The escape clause had been available in U.S. law for many years, and the anti-dumping and countervailing duty provisions had been in place, as well as the "unfair" trade provisions of section 337. But the anti-dumping provisions were rather infrequently invoked, as compared to the period immediately before the Kennedy Round. Countervail was very rarely resorted to, and section 337 had been employed primarily as a provision for dealing with allegations of patent infringement by imports. Accordingly, given the central role of the tariff structure, the efforts of policy officials in the period up to and including the Dillon Round of 1960–62 were to reduce and bind tariffs against increase, and to get rid of import quotas.

It is not easy to make a definitive judgement concerning the turning point when what is at issue is a question of emphasis. It is almost impossible, for example, to measure precisely the relative importance of one instrument of protection as against another. However, it is reasonably clear that after the Tokyo Round tariff concessions are fully implemented, there will be relatively few U.S. producers relying for protection against imports on high tariff rates. Those few — the petro-chemical industry, for example — have been able to keep high tariff rates because of their political skill rather than because of a demonstrated need for high *ad valorem* rates. As for the so-called "snapback" provisions for tariffs on textiles and garments, their existence is evidence that a choice has been made of "administered" protection rather than tariff rate protection — the purpose of the "snapback" being to reinforce the willingness of exporting countries to accept renewal of the "Multi-Fibre Arrangement."

Looking at the impact on other countries, it is difficult to judge precisely the extent to which the shift in the United States in favour of contingent protection has been or will be matched. It does appear that the Commission of the European Communities, like the United States administration, expects to use the anti-dumping system more vigorously in the future and, indeed, it may well become a fairly important mechanism for dealing with import competition in the European Economic Community (EEC) in the non-agricultural sector. As is well known, the EEC has in place a number of quantitative restrictions on

imports, from Japan and South Korea, for example; there are sometimes negotiations with those countries at the national level, sometimes at the community level, and sometimes at the industry-to-industry level. In quantitative terms, the EEC may be relying even now much more on contingency measures than on the tariff.

As for Japan, it has long been taken as given that the Japanese are more adept at "administering" protection than are the other industrialized countries. It is evident, however, that the Japanese will rely in the future rather more on formal legal methods and somewhat less on informal methods. The Japanese have now put in place, for example, detailed anti-dumping and countervailing duty provisions.

As for Canada, officials have made clear that Canada is to have just as effective an armoury of weapons against import competition as has the United States — although it may be rather less effective in a smaller country and in one so much more dependent on trade. The parallels of detail between U.S. legal provisions and the provisions proposed in the Department of Finance's *Discussion Paper*[5] are numerous. The important ones will be noted in the course of this study. But the fact that it has become necessary to have a detailed reworking and filling out of the various and scattered provisions in Canadian law on anti-dumping, on countervail, on the emergency surtax, and on the provisions for import quotas on particular products when imports are threatening "serious" injury, and the complete revision of the fragmented authority to retaliate against trade policy actions of other governments, suggests that the same shift in emphasis is well under way in Canada.

Inter-country comparisons are not easy to make because of the difficulty of devising any quantitative measure. But it would be hard to read, for example, the record of the discussions about the Trade Agreements Act in the U.S. Senate without getting the impression that the price of U.S. tariff reductions in the Tokyo Round has been the rewriting in great detail of the domestic legislation for according contingent protection, sanctioned by international agreements, which mirrored, in advance, the new U.S. legislation.

A corollary of the increased emphasis on contingent protection is the increase in what might be called the "legalism" of the system. The new U.S. legislation is cast in great detail; accordingly, it offers protection to those producers willing and financially able to pay for the legal skills necessary to work the system. Moreover, in the rewriting of the countervailing and anti-dumping provisions, Congress has reduced the scope for the exercise of discretion by the administering officials. It seems to have been the view of Congress that over the years the discretion accorded in the previous legislation was used in the main to deny protection to U.S. producers. The new statutory provisions "direct, in minute detail," exactly what is to be done.[6]

This trend to legalism and proceduralism in U.S. trade relations law, which is having its influence in other jurisdictions, is sanctioned, indeed, made obligatory, by the language of the various Tokyo Round agreements. Whether it is a desirable development, whether it will mean less or more protection, is difficult to judge at this stage. However, it is certainly not clear that the new U.S. system, taken as a whole, will be less protective than the pre–Tokyo Round system, particularly when one takes into account the fact that the agreed tariff reductions are being implemented over a period of years, while the increased efficacy, in terms of according protection, of the mechanisms of "contingent" protection are with us now.

In summary, the principal policy perceptions that provide the immediate context for the new U.S. trade relations legislation are the following: the emphasis on more effective remedies for "unfair" import competition; the central role of the concept of injury; and the related switch in emphasis and balance from a tariff-centred system of protection to a "contingency" system buttressed by market sharing or administered trade devices for critical product areas. Before we examine the various components of the contingency system, we should look briefly at the broad legal context in which these policy concepts have been developed and are deployed.

Notes

[1] The standard modern references are John H. Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969), and John H. Jackson, *Legal Problems of International Economic Relations* (St. Paul: West Publishing, 1977), Chapters 7–12.

[2] In this context it is not clear just what are the implications of the fact that the key adjective in the U.S. escape clause provisions (title II of the Trade Act of 1974) is "significant." That legislation speaks of "*significant* idling of productive facilities" and "the inability of a *significant* number of firms to operate at a reasonable profit" and "the *significant* employment . . . within the industry." The Tokyo Round agreements on anti-dumping and countervailing duties, and the U.S. legislation (at section 771 (c) of the Tariff Act of 1930, as amended by title I of the Trade Agreements Act) speak of "*significant* price undercutting" and of "the effect of imports . . . otherwise depresses prices to a *significant* degree. . . ."

A detailed review of U.S. anti-dumping and countervailing cases since the passage of the Trade Act of 1974, examining the degree of change in the various indices listed in Article 6 of the Subsidies/Countervailing Agreement, and in Article 3 of the revised Anti-dumping Code, and then comparing these cases with material injury determinations in Canada, would make it possible to judge whether the material injury standard as applied in the United States involves a greater or lesser impact than does the material injury standard being applied in Canada. One obvious difficulty in carrying out such a study is that the analytical and supporting material in a typical International Trade Commission (ITC) determination is more extensive than that published in Canada. It is only the more recent findings by the Canadian Anti-dumping Tribunal that are comparable, in their provision of data and analysis, to ITC findings.

A similar analysis might well be carried out in regard to *serious* injury, beginning, as a matter of convenience, with the published findings of the ITC under section 201 since the passing of the Trade Act of 1974. Here again there is the difficulty that

investigative bodies in Canada and in other jurisdictions publish far less information and analysis in regard to Article XIX cases than does the ITC.

For an extended and authoritative discussion of the "injury" concept in U.S. law and practice, see Matthew J. Marks, "Recent Changes in American Law on Regulatory Trade Measures," *The World Economy* 2 (February 1980): 427-40. The article is based on a paper given at a conference in Liège, Belgium, sponsored by the Commission Droit et Vie des Affaires, 19 October 1979.

[3] U.S., Congress, House, Committee on Ways and Means, Subcommittee on Trade, *Unfair Trade Practices*, 95th Cong., 2d sess., 1978, WMCP 95–99; and *Addendum to Unfair Trade Practices*, 96th Cong., 1st sess., 1979, WMCP 96–7.

[4] U.S., Congress, Senate, *Congressional Record* (23 July 1979). In the same debate Senator Long noted that the Trade Agreements Act "will provide more efficient defences to unfairly traded imports." (S10299). The theme was taken up by other senators during the ensuing discussion.

[5] Canada, Department of Finance, *Proposals on Import Policy: A Discussion Paper Proposing Changes to Canadian Import Legislation* (Ottawa: Minister of Supply and Services Canada, 1980).

[6] Marks, *op. cit.*, p. 431.

The United States Legal Environment 2

The perceptions and policy concepts discussed in the previous chapter have taken shape within a particular legal environment or context.

First, there are the implications of the U.S. constitutional concept of the "separation of powers."[1] The Constitution specifically reserves to Congress the control of commercial policy.[2] Congress has become increasingly concerned that this power not be encroached upon by the power of the President to conduct foreign policy or to exercise his general executive responsibility. As a practical matter, if Congress fails to amend U.S. trade law in accord with obligations negotiated for the United States by officials, the acceptance of those obligations by or on behalf of the President may have little effect in terms of enforceable rights in U.S. courts. The administration can bring about a negotiated change in U.S. trade law only if Congress has already delegated authority to do so, or if Congress is prepared subsequently to amend U.S. law to take account of the arrangement negotiated by the President.

The issue came to a head in the debate in Congress about the Kennedy Round Anti-dumping Code. During the Kennedy Round, Congress had passed a resolution warning the administration not to negotiate on such an issue without new authority from Congress. When the administration nevertheless negotiated the code, the question of the propriety of their doing so, given this resolution, became an issue of some controversy. Professor Stanley Metzger has stated the issue as follows:

> The President's constitutional authority was relied on in agreeing to the code. If, however, there was inconsistency between the code and the U.S. Antidumping Act, a question of priority in domestic law between a self-executing presidential agreement and a prior inconsistent federal statute was presented. The Supreme Court has never decided that question. Indeed, it went out of its way in 1955 to make clear that it was not taking the position of a lower court that had held that federal statute had priority and executive agreement was in consequence void. The basic position expressed by the lower court,

however, has received strong support, which the executive branch undoubtedly recognized. The belief that there was no inconsistency between the code and the act led the executive to bottom its case on the premise that there was no question about priorities.[3]

The practical outcome of the congressional debate was that Congress passed the Administration of the Anti-dumping Act, which reads:

> Nothing contained in the International Anti-dumping Code, signed at Geneva on June 30, 1967, shall be construed to restrict the discretion of the United States Tariff Commission in performing its duties and functions under the Anti-dumping Act, 1921, and in performing its duties and functions under such Act the secretary of the Treasury and the Tariff Commission shall —
> 1. resolve any conflict between the International Anti-dumping Code and the Anti-dumping Act, 1921, in favor of the Act as applied by the agency administering the Act and
> 2. take into account the provisions of the International Anti-dumping Code only insofar as they are consistent with the Anti-dumping Act, 1921, as applied by the agency administering the Act.

The interest of Congress in preserving, indeed, in reasserting, its authority in commercial policy was made clear in the Trade Act of 1974. It was provided that in regard to the agreements (and the related implementing legislation) to be negotiated in the Tokyo Round, the President should put before Congress "a Statement of any administrative action proposed to implement such agreements and an explanation as to how the implementing bill and proposed administrative action change or affect existing law. . . ."

The distinction between international agreement and domestic law has been made more explicit in the Trade Agreements Act. The act states that "No provision of any trade agreement approved by the Congress. . . , nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States."[4]

Given the primacy of Congress in commercial policy, it is a well-established practice for the President and Congress to proceed to implement trade agreements by amending the relevant statutes to bring them into conformity with the particular trade agreement at issue. For example, when Canada and the United States reached an agreement regarding the trade in automotive products, the United States established these new obligations in its domestic law by the enactment of a statute that altered the tariff schedules. Similarly, the Trade Agreements Act of 1979 is a set of amendments to U.S. statutes, bringing the provisions of U.S. domestic law into conformity with the Tokyo Round agreements.

An alternative, but of application only to tariffs, is the procedure invented in 1934 of asking Congress to delegate to the President a carefully limited and defined power to negotiate reductions in U.S. rates, as payment for agreed reductions in the tariff rates of other countries. This 1934 procedure, which took the form of an amendment to the Tariff Act of 1930, was renewed a number of times. This was the legal base of the Reciprocal Trade Agreements Program.

If the administration follows the detailed procedural provisions conditioning such a delegation of authority by Congress, the President may issue a proclamation that has the effect of amending the domestic law, that is, the tariff schedules. Section 101 of the Trade Act of 1974 set out the delegation of authority to negotiate and then to enact reductions in U.S. tariff rates in regard to the Tokyo Round, and used language very similar to the 1934 amendment of the Tariff Act of 1930.

Other countries also provide in their legislation for a delegation to the executive of a tariff-negotiating authority, often combined with explicit authority to reduce the rates set out in the schedules. This is the case in Canada, but in contrast to the situation in the United States, it is an unlimited delegation, both as to scope and time.[5] What is unusual about the U.S. procedure is that the delegation of authority has been instalment by instalment, negotiation by negotiation.

A second feature of the legal environment is the extraordinary degree of detail in the statute and in the regulatory provisions. It would be more correct to say the "order" of detail because, as compared with European legal systems, and even with the Canadian system, the detail of U.S. law in the commercial policy area is of a quite different order. Matters that in other jurisdictions are prescribed by the minister of the department, or set out in internal administrative rules, are, in the United States, prescribed by statute or by regulation. These detailed provisions provide a basis for establishing the rights of interested parties. From an American point of view, this is one of the merits of the U.S. system. Nowhere is this feature of U.S. law making more evident than in the area of trade relations legislation.

There are a number of factors that have fostered this tendency to legislate in such detail. In a unitary state, perhaps perceived as having a relatively more homogeneous social structure, it may be accepted that the authorities have an inherent right and an inherent competence to administer the law, and to do so more flexibly than would be accepted in a less structured, more diversified society such as the United States. Moreover, the U.S. political structure — the presidential system and the division of powers — tends to institutionalize, even to magnify, the powers of special interest groups. Such interest groups inevitably try to protect their interests by securing the enactment of protective legislation in ever greater detail,

including, very importantly, detail as to procedure. And in commercial policy matters, such as tariffs or customs valuation, the interest and the effects are all in the detail and in the procedures of administration.

One other factor tending to reinforce the habit of legislating in great detail has been the development of a widely held conviction in congressional circles that the administration always tends to try to negotiate around congressional views and to use international agreements to contain the interests, even to frustrate the aims, of special interest groups, who are, after all, the constituents of congressmen. Congress became convinced that the legislative provisions designed to protect U.S. producers against intolerable — and particularly against "unfair" — import competition were not being administered with due diligence. American citizens were being denied the protection that Congress had legislated for them. One answer to this was to write the law in greater and greater detail.

These perceptions by Congress are, of course, what lay behind the stated requirements of the Trade Act of 1974 for continual close consultation between the negotiators and Congress during the Tokyo Round. Moreover, Congress specified, in much detail, U.S. objectives in the negotiations, and the procedures for the conduct of the negotiations. The force of this sentiment has ensured that there is great detail, with regard to both substance and procedure, in the Trade Agreements Act of 1979.

It may be, finally, that the preference for prescribing in detail is, in part, the result of the commanding role, in the administration and in Congress, played by the legal profession. It is, one assumes, in the interest of lawyers that law be detailed rather than vague, and that there be more law rather than less law.[6]

A third element in the U.S. legal environment that is significant for trade relations policy is the rule for interpreting statutes. In certain other countries, for example, in Canada, the practice of the courts is to strive to find the meaning of a statute solely from the words of the statute itself. The legislators are presumed to have said what they meant and meant what they said. Lawyers and judges go to great lengths to extract a meaning from even the most confused drafting. In the United States, by contrast, the established practice is to seek guidance as to the meaning of the statutory language not only from statute but also from the history of the legislation, unless the statute speaks unequivocally.

The following is an example of "legislative history" that will be important. Senator Roth, at the time the ranking Republican member of the International Trade Sub-Committee of the Senate Committee on Finance, when he introduced the Trade Agreements Act in the Senate, gave his interpretation of the language of the statute. He said: "We argued long and hard over the exact phraseology of the material injury

test. While I believe different language would have been more clear, there was no doubt about the Congressional intent. The material injury criterion should be consistent with the criterion used by the ITC (the International Trade Commission) under existing law for anti-dumping cases in the period between January 3, 1975 and July 2, 1979. *The Congress does not intend a tougher injury test*" (emphasis added).[7] This view was later concurred in by other key senators, notably, by Senator Ribicoff.[8] It is also reflected in the Committee *Report*.[9]

The recent trade legislation of the United States is to be found not only in the Trade Agreements Act and in the various sections of previous acts, such as the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974 (certain sections of which still apply), and the various rules (or subordinate legislation)[10] issued under the authority of this and the other relevant statute, such as the Administrative Procedure Act, but also in the *Report* of the Committee of Ways and Means on the Trade Agreements Act, the *Report* of the Senate Committee on Finance on the Act, the record of debate on these matters as set out in the *Congressional Record* in the House (10 July 1979) and in the Senate (23 July 1979).

Moreover, there is an additional element, "The Statement of Administrative Action," which the Trade Act called for. Congressmen had this interpretive and explanatory statement before them when they considered the proposed legislation; further, Congress specifically approved the statement by section (2) of the act.

All the above multiplies severalfold the sheer volume of words that may have to be examined to determine the import of a given provision of the Trade Act or the Trade Agreements Act.

A fourth component in the legal context of U.S. trade relations policy is the detailed care shown for the protection of private rights. There are the provisions for public hearings in relation to such matters as tariff negotiations, "escape clause" petitions, and anti-dumping actions. There are detailed provisions regarding procedures and the time periods allowed for such procedures to be worked, for complaints to be filed, for interested parties to be notified and heard, for notices to be published, for findings, and the reasons for such findings, to be published. There are also the provisions for appeals to the courts, both on matters of substance and on questions of procedural propriety.

In favour of this latter aspect of the U.S. system, one would argue that the provisions for hearings and the rights of appeal to the courts are available as to a wide variety of issues, that expert advice is available, and that the detailed findings and opinions, when handed down by the ITC or the courts, do provide considerable guidance to all interested parties, and that they establish precedents which deter-

mine actions by administrators. Against this system of hearings and of judicial review of trade relations legislation, however, it can be argued that "justice delayed is justice denied." The cost of pursuing a case before the administration, before the ITC, and in the courts is very substantial, and a long period may elapse before a complicated case can be concluded.

To sum up, there are four main elements or factors in the legal environment of U.S. trade policy: the importance of the separation of powers and the dominant role of Congress; the prescription of detail and procedure; the importance of "legislative history," of congressional intent, in the interpretation of trade relations law; and the pervasive concern for the protection of private rights.

Notes

[1] See John H. Jackson, *Legal Problems of International Economic Relations* (St. Paul: West Publishing, 1977), Chapters 3 and 4 for comments on the status of the GATT in U.S. domestic law.

[2] U.S., *Constitution*, Article I, section 8. "The Congress shall have power . . . to regulate commerce with foreign nations. . . ." See *Constitution/Jefferson's Manual and Rules of the House of Representatives* (Washington, D.C.: Government Printing Office, 1973).

[3] Stanley Metzger, *Lowering Nontariff Barriers* (Washington, D.C.: The Brookings Institution, 1974), p. 86.

[4] Senator Roth: "Most importantly, the Codes have force and effect only as embodied in U.S. law." U.S., Congress, Senate, *Congressional Record* (23 July 1979), S10290.

[5] The delegation authority is contained in the Customs Tariff, section 11.

[6] See Robert E. Herzstein, "The Role of Law and Lawyers Under the New Multilateral Trade Agreements," *Georgia Journal of International and Comparative Law* 9 (1970): 177–205.

[7] *Congressional Record* (23 July 1979), S10290.

[8] *Ibid.*, at S10311.

[9] U.S., Congress, Senate, Finance Committee, *Trade Agreements Act of 1979*, 96th Cong., 1st sess., 1979, S. Rept. 249.

[10] See Vol. 19 of the *United States Code of Federal Regulations*.

The Escape Clause 3

This chapter examines U.S. legislation providing for "safeguard" or emergency action against imports, that is, for action against "fair" import competition that causes or threatens *serious* injury. The history and scope of these provisions (the "escape clause") will be considered first, and then some comparisons will be drawn with Canadian law and practice, noting particularly the amendments proposed in the Department of Finance's *Discussion Paper* of 1980.

The text of the current U.S. escape clause provisions are to be found in title II of the Trade Act of 1974, as amended by the Trade Agreements Act, and discussed in the *Report* of the Finance Committee.

These provisions were not amended, except in detail, by the Trade Agreements Act. Agreement was not reached in the Tokyo Round on this issue, and discussions are continuing. Moreover, it did not seem during these discussions that significant changes in U.S. law or practice would be required. The thrust of much of the discussion had been to move other countries toward adopting a number of U.S. provisions, particularly those calling for public hearings and other procedures. The proposed Canadian legislation moves in this direction. The main change introduced in the Trade Agreements Act was the addition of the authority to auction import licences for products subject to import restrictions under escape clause actions.

The language of Article XIX of the GATT is based on the 1942 agreement between the United States and Mexico;[1] the present escape clause in U.S. law originated in the Trade Agreements Extension Act of 1951, one of the series of acts that, from time to time, renewed the Reciprocal Trade Agreements Program. The 1962 act, the U.S. negotiating mandate for the Kennedy Round, revised and extended these 1951 provisions. The 1962 act provided that the Tariff Commission (now the International Trade Commission) was, in the circumstances specified in the act, to carry out an investigation to decide whether or not serious injury was caused *in major part* by concessions agreed in trade negotiations. The Tariff Commission might recommend a tariff increase or some other form of restriction on imports to

prevent such serious injury continuing. An alternative course of action was provided: the President could, in lieu of a tariff increase or quantitative restriction, negotiate an "orderly marketing agreement" to limit exports to the United States.

The 1974 act abandoned the causality wording of the 1962 act in favour of what was believed to be weaker language, that is, language that would make it easier to satisfy the legal requirement to show the causal link between the imports in question and the serious injury alleged to exist.[2] The 1974 act provided that the Commission should determine "whether an article is being imported into the United States in such increased quantities as to be a *substantial cause* of serious injury . . . to the domestic industry." The implications of this change were examined by the Commission it its report, *Wrapper Tobacco*:

> The term "substantial cause" is new to the criteria which must be met in order for an industry in the United States to be eligible for import relief. As our negative determination in this investigation turns upon the meaning of this term, a thorough examination of the meaning of the phrase is appropriate.
>
> The requirement that increased imports be "a substantial cause" of actual or threatened serious injury represents a relaxation of the analogous "major cause" standard employed in Section 301(b)(1) of the Trade Expansion Act of 1962 (TEA), the predecessor provision to Section 201(b)(1). Although neither the TEA nor its legislative history expressly defined the term "major cause," the term was generally interpreted by many — although never expressly by the Commission — to mean a cause greater than all other causes combined. In practice it and the other criteria of the TEA proved to be a difficult standard to satisfy, as illustrated by the fact that a majority of the Commission found the criteria satisfied in only 3 of the 26 industry cases completed under that Act.
>
> The new "substantial cause" criterion of Section 201(b)(1) provides that a dual test be met. The Trade Act, in Section 201(b)(4), defines "substantial cause" to mean "a cause which is important and not less than any other." Thus, imports must constitute both an "important" cause of the serious injury and be "not less than any other" cause. The two terms are not synonymous. An "important" cause is not necessarily a cause "not less than any other." And, vice versa, a cause "not less than any other" is not necessarily "important." Increased imports must be both an "important" cause and "not less than any cause" of the serious injury.
>
> What is an "important" cause? The legislative histories of Section 201 and of the related provision concerning eligibility for worker adjustment assistance, Section 222 of the Trade Act, provide help. The legislative history of Section 222 tells us that an "important"

cause need not be the "major cause," but that it must be "significantly" more than a "*de minimis*" cause. The legislative history of Section 201 indicates that where increased imports are just one cause of many causes of equal weight, it would be unlikely that they would constitute an "important" cause, but where imports are one of two factors of equal weight, they would constitute an "important" cause.

What is a cause "not less than any other" cause? The legislative history of Section 201 provides an answer. The test is satisfied if imports are a *more important* cause of injury than any other cause. The test is also satisfied if imports are one of several *equal causes* of injury and no one cause is more important than imports. But the test is not satisfied if there is a cause of injury more important than imports.[3]

These issues are again examined in the more recent report, *Certain Motor Vehicles*. A number of commissioners went over the arguments in great detail, applying them to the case at issue. The question had been raised before the Commission as to whether or not a cause of injury that a number of commissioners found to be a cause greater than the increase in imports — namely, a decline in demand — was itself the result of a series of separate, and therefore smaller, causes (e.g., higher gasoline costs, higher interest charges, the decline in income of the unemployed).[4] Because of the importance of this question of which is the greatest cause of injury, the commissioners reiterated the logic of "causality" in this area of U.S. law.

The Commission is directed to take into account "with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers." The Commission is further directed to investigate "any factors which in its judgment may be contributing to increased imports" and if it finds that there is dumping, subsidization, or any of the matters falling under section 337, then it must notify the agency concerned (the International Trade Administration in the Department of Commerce or the ITC itself) so that action can be taken under those other provisions.

This chapter in the 1974 act providing for import relief from "fair" competition contains extensive provisions for adjustment assistance to workers, firms and communities, and extensive provisions setting out procedures, including public hearings at which interested parties may appear. These two features alone distinguish the U.S. escape clause system from the legal framework for safeguard action in other jurisdictions. There are a number of other features of U.S. law and practice that call for comment.

First, the legislation speaks of imports "in such increased quantities." Article XIX of the GATT (paragraph 1(a)) speaks of "in such

increased quantities and under such conditions" and specifies that these two elements must be "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party" under the GATT. It would seem from the wording of the U.S. provisions that action could be contemplated that would not meet the criteria of 1(a) of Article XIX. The proposed Canadian legislation speaks only of "under such conditions." Were an agreement to be negotiated reinterpreting Article XIX, it would be appropriate to consider, both in the United States and Canada, whether all criteria as might be agreed for safeguard action should be specified in domestic legislation.

Secondly, there is the question of *causality*. Article XIX says "as to cause"; that implies that a condition of serious injury is determined to exist and then that it can be shown to be due to the imports entering the market and meeting the criteria noted above. This drafting implies that there may be other factors also injuring the industry, and that those injuries, even if they are serious, may not be remedied by recourse to action against imports. It is thus implicit in this drafting that "injury" is a *separable* concept, that an industry may be suffering from a variety of adverse impacts. What is at issue in Article XIX is whether there is an injury caused by imports and whether that injury is a *serious* injury.

The causality language of the U.S. legislation, both in the 1962 act and as revised in the 1974 act, appears to rest on the notion that a judgement about injury is a judgement about the overall health or well-being of an industry. Some American experts read Article XIX of the GATT in the same fashion, and therefore believe it provides for a lower threshold of injury than does the U.S. provision.[5] It is important to bear in mind, as will be noted below, that this view of causality has been abandoned in the revision of the Anti-dumping Code (and in the provisions regarding causality in the Subsidies/Countervailing Agreement). The language there implies *separable* injuries, as does Article VI of the GATT. This different concept of injury has been reflected in the revised U.S. legislation on these two matters.

Thirdly, there is the matter of procedure. The U.S. legislation makes provision for public hearings for interested parties — including foreign exporters, importers, and not excluding governmental representatives — to be heard and for a report to be issued, including a statement of the rationale for any finding and of any dissenting or additional views. The role of procedures as being an important limitation on the President's authority to limit imports, and as a safeguard for interested parties, is emphasized in the opinion of the United States Court of Appeals (District of Columbia Circuit) in *Consumers Union* v. *Kissinger*, which involved certain restraints on exports of steel that the U.S. authorities negotiated with foreign firms.

The importance of these procedures, and whether the United States will continue to treat them as central to any sort of action to limit "fair" import competition, was what was at issue in the decision to insist that the Japanese government impose limitations on exports of automobiles to the United States. The ITC had determined, in *Certain Motor Vehicles*, that imports of automobiles were not a "substantial cause" of injury to the U.S. automobile industry. The decision to seek an export restraint meant that these procedural safeguards were overridden. The substance of an import restriction was achieved by relying on the authority of the Japanese government, and thus avoiding any overt restrictive action by the U.S. administration.[6]

The provisions for domestic procedures are not matched in the domestic legislation of other contracting parties. However, the proposed Canadian legislation goes a considerable distance in this direction, in that it provides for inquiries by the proposed Canadian Import Tribunal or by the Textile and Clothing Board. Clearly the U.S. provisions, when they are not evaded, do serve to protect the legitimate interests of exporters as well as producers. Rather less weight must be put on the GATT conciliation and dispute settlement procedures than would be the case were not these procedures available in domestic law. In the event of a GATT examination of U.S. action under Article XIX, other contracting parties have available to them a relatively detailed analysis of the situation of the industry affected.

Fourthly, the United States has shown a strong preference for taking action to restrict imports for a significant period, such as for a number of years, under Article XIX, rather than negotiating a nominally permanent increase in the level of a bound tariff, under the provisions of Article XXVIII. The two articles have rather different rules about compensation, but it is unlikely that this is the reason for the U.S. preference. It is rather that it has never been contemplated that in U.S. law there should be any provision for permanently changing bound tariff rates except, of course, by negotiating reductions. The route to higher rates, or other relief against imports, has been through the escape clause of the domestic legislation, and thus through Article XIX. The United States has used Article XXVIII only for such basic changes as the restructuring of the tariff schedules, or the conversion of specific duties to *ad valorem* rates.[7]

Fifthly, it is important to note the emphasis in title II of the 1974 act on the need for *adjustment* by the domestic producers to "fair" import competition. Section 201(a)(1) begins with a phrase that gives great emphasis to the concept of adjustment, and makes clear that import relief is to be contemplated for the purpose of "facilitating *orderly* adjustment" (emphasis added). The provision reads:

> A petition for eligibility for import relief for the purpose of facilitating orderly adjustment to import competition may be filed

> . . . by an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry. The petition shall include a statement describing the specific purpose for which import relief is being sought, which may include such objectives as facilitating the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition.

The title contains detailed substantive and procedural provisions covering adjustment assistance to workers, firms, and communities. It is not proposed to analyse these provisions here, but merely to note that the United States has legislated on these matters in great detail, rather in contrast to other contracting parties, including Canada. It is therefore for consideration whether in any "safeguards" agreement there should not be some understanding that contracting parties should make provision for adjustment assistance to be available to domestic producers as an alternative to Article XIX action against imports. This is an issue that should be considered during examination of the Canadian scheme in the *Discussion Paper*. It would, of course, be inappropriate to make any such provision mandatory in the international agreement; it would be adding a significant obligation to Article XIX (or, alternatively, reducing the rights of contracting parties who might wish to maintain the right to give protection to domestic producers under Article XIX as it stands). It would be impractical and, from an American point of view, illogical to contemplate adding an "adjustment" obligation to the anti-dumping duties and countervailing duties understandings. These mechanisms deal with what in the U.S. perception, and in the perception of other contracting parties, are "unfair" methods of competition; on this view, there should be a right to a remedy without compensation and without any obligation to adjust.

Adjustment programmes are, of course, subsidy programmes; it would be a perverse result of a "safeguards" agreement if safeguard or escape clause procedures created a substantive right for the United States to subsidize its weak industries in order to offset competition from imports.

Sixthly, Article XIX speaks of "injury to domestic producers"; in contrast, Article VI speaks of an "industry."[8] From an American point of view, because Article XIX speaks of *producers*, it could be read to be within the terms of that article to provide protection for "one or more domestic producers, who produce a like or directly competitive article in a major geographic area of the United States. . . ."[9] This could be used to give protection to producers in a regional market. It is a less rigorous definition of a "regional industry" than the corresponding paragraphs of the anti-dumping duties and countervailing duties provisions.[10]

Seventhly, the U.S. legislation includes authority for the President to *not* act on a recommendation of the ITC that import relief be granted.[11] In the recent *Leather Garments* case, for example, the President did refuse import relief.

Here the contrast with the Canadian approach is of interest. The proposed Canadian legislation is cast in an entirely discretionary form. In the *Discussion Paper*,[12] it is proposed that the government *may* impose a surtax when there is a report to it that there is serious injury caused or threatened by imports. Whether, as a political matter, the government will have any significant freedom to *not* act when there is such a report remains to be seen. The Canadian system could, as a practical matter, be no more discretionary than the U.S. system.

The President in deciding whether to grant import relief, and by what method and in what amount, is directed (in section 202) to take into account a number of considerations: the extent of adjustment assistance to workers in the industry; the extent of adjustment assistance to firms; the effectiveness of import relief in promoting adjustment and the efforts being made by the industry to adjust; the effect on consumers; the effect on competition; the effect on the international *economic* interests of the United States; the impact on U.S. firms and industries of any possible compensation necessary under Article XIX; the impact on the U.S. market of restraints in third-country markets (i.e., the diversion effect of other countries' restraints); and the economic and social costs of not granting import relief.

This enumeration of factors to be taken into account by the President when the ITC has recommended import relief makes clear the extent to which Congress has conditioned import relief from "fair" competition, as compared with the much more nearly automatic availability of relief from "unfair" competition. There is, of course, a bias or presumption in the legislative scheme that import relief, in some form and in some measure, will be granted when the ITC so recommends. To this end, Congress has reserved the right to reverse the President's decision not to accept the ITC proposal.[13] This "override" provision manifests Congress' assertion of its primacy in regard to commercial relations, and its determination to have the last word as to the use of the power delegated to the President.

Congress did consider whether or not to override the President's decision in the *Leather Garments* case (which is discussed below). Like some other U.S. escape clause actions, it involved possible actions against imports from Canada in situations in which it is imports from other sources that cause the problem. This is, of course, the inevitable result of the non-discriminatory application of measures invoked under Article XIX of the GATT. This is, to put it one way, the price Canada pays for insisting, with other countries, that the most-

favoured-nation provisions of the GATT (Article I) cover actions under Article XIX. This non-discriminatory impact is in contrast with anti-dumping and countervailing duties, which, of course, deal only with the imports at issue, and are therefore, in that sense, discriminatory.

Recent escape clause actions involving Canadian exports are the cases concerning honey, fish, industrial fasteners, specialty steels, leather garments, and automobiles. Of these cases, only the case involving fish involves Canadian exports as the primary source of import competition. Clearly, Canadian trade is often at risk because of problems of import penetration in the United States arising from other sources.

The escape clause action on fish is of particular interest because it was part of a pattern of conflict between the American and Canadian ground-fish industries. This conflict had arisen in the context of the extension by both Canada and the United States of their fishing limits to 200 miles and the lack of agreement on the boundaries between their two fishing zones, combined with problems related to the management of the fisheries in the two zones.

The United States east coast fishery is subject to a system of conservation quotas; in circumstances in which U.S. fishermen are limited in the amount of fish they may take, there is a risk that imports will fill any increased demand. The east coast industry launched a series of complaints that the Canadian industry was being subsidized. During the Tokyo Round, the Treasury found that certain Canadian fish were subsidized.[14] After discussions with the Canadian authorities, countervail was waived in regard to certain dutiable fish, in regard to which there was, of course, no injury test, pursuant to the authority given the secretary of the treasury to waive countervailing duties during the Tokyo Round. Under the transitional arrangements of the Trade Agreements Act, all those cases for which there was a waiver, but for which a countervailing duty order was still in effect, were brought before the ITC for inquiry into whether or not there was material injury. The ITC reported that imports of subsidized dutiable fish, like imports of duty-free fish, were not causing or threatening injury to U.S. producers.[15]

However, in parallel, there was an escape clause action filed by west coast fishermen; the countervailing duty cases had been based largely on the complaints of the New England industry. In the Commission's report on this action, as in the earlier countervailing duty case, there are a number of comments about information requested not being supplied by the producers, and allegations as to the effects of imports not being supported. For example, the Commission noted: "Although there were allegations of lost sales made at the public hearing in Seattle, Washington, the Commission did not receive any material to support such allegations."[16]

Clearly, it is against the interests of producers to withhold information or not support allegations. The public hearing and reporting requirements of the U.S. escape clause have the effect of forcing producers seeking to limit imports to make a proper case, or to see their request prejudiced. In its report, the Commission found that imports were not a "substantial" cause of injury. They stated:

> Imports might well be a problem to the U.S. fishing industry but our investigation has revealed that a too-rapid expansion of the fishing fleet on the west coast is the primary problem of west coast U.S. fishermen, and the conservation quotas on the east coast are the primary problem for east coast fishermen.

And later:

> We conclude that the domestic industry is *not* being "seriously injured" within the meaning of that term in the Trade Act.

The Commission not having found injury, the mechanisms of the escape clause in the Trade Act could not be activated. In a case such as this, the Commission acted as a screen protecting the administration from political pressures. No injury having been found, the President had available an effective answer to any demand to restrict imports. Advocates of the U.S. system of public hearing and public report, and exporters to the United States, may point to this case as showing the great value of the procedural requirements in U.S. law. On the other side, one should not forget that in a period of a few years, the U.S. industry launched three countervail cases and one escape clause action against Canadian fish, that the effort to defend Canadian export interests, in terms of the making of representations to the U.S. authorities by the Canadian government, and by the Canadian industry, was expensive in terms of management time, and that it is likely that this attack on imports did bring about some reduction in Canadian export activity.

Another important escape clause case involving Canadian interests was the case involving imports of stainless steel or alloy tool steel. The ITC reported on 16 January 1976 that these products were being imported in such increased quantities that they were a substantial cause of serious injury, or threat thereof, to the domestic industry. The report was considered by some to make not a very convincing case that there was any real threat of injury. However, in Washington, the view was that if the President did not accept the ITC recommendation to grant import relief, Congress would override the President's decision. It was felt that creating such an issue between the President and Congress would interfere with the management of the Tokyo Round. In the event, the President decided to authorize the negotiation of "orderly marketing arrangements," as contemplated in section 203

(2)(4) of the Trade Act, rather than impose quantitative restrictions as recommended by the ITC. However, only Japan, the major source of imports, was prepared to agree to such an arrangement. Accordingly, imports were brought under quota, following the requirement in section 203(e)(i) that import relief be instituted no later than ninety days after the decision to try to negotiate orderly marketing arrangements. This provision was, presumably, intended to limit the scope for delay by other countries in such negotiations.[17]

From the Canadian point of view, there were a number of important features in this case. First, Canadian exporters and officials were not convinced by the ITC report that there was a clear-cut case meeting the criteria of Article XIX, and they pressed this view on U.S. officials.

Secondly, Canadian exports, in most years the smallest in quantity from any important source, were not causing difficulties for U.S. producers. They were made subject to import control because of the requirement that Article XIX measures be applied on a non-discriminatory basis to imports from all sources. Moreover, it was fairly clear that the EEC would have opposed strongly any special exemption for Canada, fearing that Canadian exports would gain in the U.S. market at the expense of EEC exports.

Thirdly, Canadian imports from the United States of these products were greater than Canadian exports to the United States. Accordingly, there were pressures in Canada for retaliatory measures to be taken by Canada under Article XIX. There were those in the United States who felt that such a reaction by Canada would have had the useful result of showing that ill-founded escape clause action could be costly, particularly when the industry concerned is also an exporter. (The Canadians did keep their rights open under Article XIX by extending the ninety-day period provided for in that article. It is understood that, although the quotas have been removed, the question of compensatory action is still being discussed between the two governments.)

Fourthly, the administration of the import quotas, which involves such questions as timing (not more than 60 per cent of any quota to be entered in the first six months of the restraint period), re-allocation of shortfalls, special carry-over and adjustment provisions for Japan (given their orderly marketing agreement), reports on U.S. production, shipment, employment, man-hours, and prices, published every three months by the ITC, was quite burdensome. It involved Canadian officials and officials of other exporting countries in virtually continuous negotiations with Washington officials.

Another case involving Canadian exports was that concerning *Leather Garments*. In July 1979, the U.S. industry producing leather garments and the relevant trade unions filed an escape clause petition. In its report[18] to the President, the ITC found serious injury and recommended an increase in the tariff rate for a period of three

years — 25 per cent for the first year, 20 per cent the second year, and 15 per cent the third year — on garments valued f.o.b. at less than $150 each. The Commission noted that leather garments are very material intensive; that Argentina, Uruguay, and Brazil had export restrictions on hides; and that their garment producers sometimes paid less for raw materials than do U.S. producers. Argentina and Uruguay were two of the three exporting countries that had increased their exports significantly to the United States.

For Canadian exporters, there were problems with the Commission's analysis and proposals. First, the Commission's analysis of price data was incomplete, because it did not appear to cover imports at those ports where Canadian exports to the United States were entered. Secondly, the Canadian industry, unlike other exporters to the United States, was faced with the same high material costs as were U.S. producers. Canadian producers asked: why should export restrictions on leather by Argentina and others lead to a restriction on Canadian exports of products made of leather? Thirdly, Canadian producers imported most of their tanned leather from the United States. A high U.S. tariff on garments might merely divert imports from being sourced in Canada to being sourced elsewhere; one certain result would be a loss of business to U.S. leather exporters. Fourthly, the price break for the proposed tariff ($150) seemed too high; many Canadian garments were priced below that level, and would be hit by the tariff increase. However, the *ad valorem* tariff increase would not decisively affect the competitiveness of much cheaper garments from some other sources. Canadian interests therefore suggested that possibly a much lower price break would be appropriate. These criticisms of the Commission's analysis and proposal were conveyed to U.S. officials. When the matter was put before the President, he rejected the Commission's proposals for import relief. Subsequently a series of petitions were filed alleging subsidization by certain countries, and these were addressed under the countervailing duty provisions. By definition, these country-specific investigations do not affect Canadian exports.

Reference was made above to the case *Certain Motor Vehicles*. This case is important because, despite the negative determination of the ITC, the administration achieved a restriction by negotiating with the exporting country; moreover it is of special interest to Canada because the issue arose whether or not vehicle imports from Canada under the provisions of the Automotive Products Agreement were to be considered imports for the purposes of the escape clause action. At several points in the report,[19] it was made clear that the Automotive Products Agreement related to tariffs, that both Canada and the United States, in the text of that agreement, had retained their GATT Article XIX rights, and that the language of the Trade Act did not allow the ITC to

treat imports from Canada as not being imports. However, as the chairman made clear, it would have been possible to devise a general import-restricting measure that applied to imports from Canada without reducing the volume of such imports. Chairman Alberger said:

> Had the Commission made an affirmative determination, it could have fashioned a ready recommendation that, in effect, did not reduce the volume of imports from Canada or increase tariff levels on such goods. Since Canadian imports have declined in recent years, this could have been accomplished by recommending tariff-rate quotas or quantitative restrictions allocated on a country-by-country basis and based on imports during the most recent representative period.[20]

Because the Commission made a negative recommendation, this issue was not pursued.

These cases may be representative, but they are obviously too small a sample to warrant any significant conclusions being drawn about the economic impact on Canada of U.S. escape clause actions. However, they do tend to show that Canadian exports can get caught up in actions relating primarily to imports from other sources. On the other hand, given the very wide range of Canadian exports to the United States, it is perhaps noteworthy how very few cases arise related primarily to Canadian exports.

Notes

[1] John H. Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969), pp. 553–55.

[2] For a discussion of "substantial cause," see International Trade Commission, *Wrapper Tobacco*, Investigation TA–201–3, 1975; *Birch Plywood Door Skins*, Investigation TA–201–1, October 1975; *Honey*, Investigation TA–201–14, June 1976; *Certain Motor Vehicles*, Investigation TA–201–44, December 1980.

[3] International Trade Commission, *Wrapper Tobacco*, p. 5.

[4] International Trade Commission, *Certain Motor Vehicles*.

[5] See "notes" prepared for "The Escape Clause, Market Disruption and Voluntary Restraints," National Institute on Critical Issues of International Trade Law, Washington, 21–27 April 1981 (to be published).

[6] There are also implications under the anti-trust provisions. The issues were examined in the letter of 18 February 1981, from the Attorney General:

> Honourable William E. Brock
> United States Trade Representative
> Washington, D.C. 20506
>
> Dear Mr. Ambassador:
> This is in reply to your letter of February 6 seeking confirmation or clarification of past advice and opinions expressed by this Department on the President's

authority to negotiate or otherwise seek restraints on imports of automobiles. In addition, you ask our advice on how best to avoid difficulties with United States law in this context.

Antitrust is an important concern when contemplating import restraints. Generally speaking, an agreement among foreign private companies to reduce the numbers of automobiles they export to this country would most likely violate United States antitrust law. However, we believe that if such an agreement were formally mandated by a foreign government, the formal mandate would provide a defense to any subsequent antitrust challenge. In such litigation, the degree of foreign governmental involvement would be a key issue. Thus, if the foreign government should compel the precise agreement through the use of appropriate legal powers, *i.e.*, by the imposition of export controls or other binding measures, a strong "governmental action" defense would be available.*

* In some circumstances, antitrust immunity for voluntary, private action restraining exports to the United States arguably may be implied when the President is authorized under Section 201 of the Trade Act of 1974 to negotiate "orderly marketing agreements" with foreign governments. No such authority currently exists with respect to automobiles; thus Section 201 provides no basis for such an argument at the present time. Moreover, this "implied immunity" argument is not settled law and proceeding under it would thus entail risk in any event.

The antitrust risks that would be raised by concerted, voluntary, private behavior by foreign producers have led us to conclude that in any negotiations between our government and a foreign government in which our government seeks a reduction in imports from that country, United States negotiators should emphasize the need for the foreign government to provide protection to its companies from actions under United States antitrust laws by ordering, directing, or compelling any agreement restraining exports to the United States in terms as specific as possible.*

* It should be emphasized that while antitrust prosecution by the United States itself of import restraints achieved through government-to-government negotiation is unlikely, private antitrust actions could nonetheless be instituted.

If United States negotiators urge only mandatory foreign governmental action, we believe that they would run no substantial risk of antitrust liability, even if the foreign government fails to implement a government-to-government agreement by mandatory, legally binding measures. Nevertheless, it should be noted that any private antitrust suit challenging import restraints in such circumstances might involve United States government negotiators in depositions in which the circumstances of the agreement would be examined. As with any private case, the complaint could be drafted in such fashion as to allow far-ranging discovery and might even include *allegations* of liability on the part of government negotiators.

In order to minimize the likelihood of such allegations, we believe that any negotiations seeking import restraints should be kept on a government-to-government level, and direct dealings with foreign manufacturers, either individually or as a group, avoided. Similarly, in preparing for such discussions, United States negotiators are best advised to avoid contacts that could be characterized as facilitating or serving as a conduit for a private arrangement between American firms and their foreign competitors.

In summary, this Department believes that although the President has inherent legal authority to negotiate directly with foreign governments to seek import restraints, where such negotiations are implemented through voluntary private behavior serious antitrust risks arise. Foreign or United States governmental "approval," "urging," or "guidance" of such behavior cannot safely be relied on as a defense; if the foreign government does not provide adequate protection by mandating the restraints in a legally binding manner, private antitrust suits could jeopardize the effective implementation of any agreements that are negotiated.

I hope this letter has been helpful.

Sincerely yours,

William French Smith
Attorney General

[7] It is of some interest that many of the tariff rate increases negotiated by Canada under the provisions of Article XXVIII, in the period 1947–1975, when the Tokyo Round started, were negotiated away in the later tariff negotiations. Many nominally permanent changes in tariff rates put in place through Article XXVIII action by Canada were, it has turned out, in effect for periods shorter than the five-year maximum period provided for in the U.S. "escape clause" legislation.

[8] At various points in section 201, etc.

[9] See section 201(b)(3)(c).

[10] Section 771 of the Tariff Act, as provided for in title I of the Trade Agreements Act of 1979.

[11] Section 203(a) and (b).

[12] Canada, Department of Finance, *Proposals on Import Policy: A Discussion Paper Proposing Changes to Canadian Import Legislation* (Ottawa: Minister of Supply and Services Canada, 1980), p. 74.

[13] Section 203(c).

[14] Duty-free fish found to be subsidized were the subject of injury inquiries by the ITC, under the provisions requiring an injury test before countervail could be applied to duty-free goods. In investigations 303–TA–3 and 303–TA–9, the Commission found that these imports were not injurious to the U.S. industry.

[15] International Trade Commission, Investigation 701–TA–4D, May 1980.

[16] International Trade Commission, Investigation TA–201–41, January 1980, p. 10.

[17] 41 *Federal Register*, No. 54 (18 March 1976), 11269, for text of decision to negotiate orderly marketing arrangements; *White House Press Release* (11 June 1976), for text of decision on import quotas.

[18] 45 *Federal Register*, No. 26 (6 February 1980), 8165.

[19] International Trade Commission, *Certain Motor Vehicles*.

[20] *Ibid.*, pp. 12–13.

Remedies for Unfair Import Competition: Anti-Dumping Duties, Countervailing Duties

4

This chapter discusses the United States' implementation of the revised Anti-dumping Agreement or Code and of the countervailing duties provisions of the Subsidies/Countervailing Agreement. First, there are some comments on the broad policy or rationale of the U.S. anti-dumping system and of the countervailing duties system. These are supplemented by comments on the definition of a subsidy in U.S. law. The more extensive portion of the chapter examines a number of concepts of U.S. law that are common to the anti-dumping provisions and the countervailing duties provisions.

Anti-dumping

Dumping is one manifestation of price discrimination. It is selling in an external market at less than the comparable price for which the same product is sold by the same seller in the domestic market of that seller. It is implicit in the U.S. system, as it is in the Canadian system, that an export sale at less than the going price in the importing country is not necessarily dumping, although it may be damaging to domestic producers. Such import competition, if it is not dumping, cannot, under the GATT or under U.S. or Canadian laws, be countered by anti-dumping measures.

Another premise — an unwritten premise — of the GATT, of the Tokyo Round agreement, and of U.S. and Canadian laws, is that except to the extent that producers are adversely affected by dumping, dumping increases economic welfare in the importing country. Article VI of the GATT and the agreement make clear that dumping is not to be offset by an anti-dumping duty unless such dumping injures or threatens to injure a domestic industry. Article VI states that dumping "is to be condemned if it causes or threatens material injury to an established industry . . . or materially retards the establishment of a domestic industry." These phrases of Article VI were designed to make clear that if dumping does not cause or threaten injury, it may not be offset with an anti-dumping duty.

Another working assumption of the legislative scheme relates to the question of motive. There may be many reasons for dumping.[2] It may

be motivated by the need to dispose of some production surplus to the demand in the domestic market. It may be a deliberate attempt to destroy an existing or potential competitor, or it may reflect a decision to make certain additional profits by additional production at marginal cost without reducing the profits realizable in the protected or restricted market of the exporting country. Most international trade economists would agree that to dump in order to eliminate a competitor in the importing country, and then to cease dumping, to raise prices, and then to extract a monopoly or oligopoly profit is the most objectionable form of dumping. This is "predatory" dumping. There are only temporary welfare gains in the importing country, and there may be a net loss of welfare when the domestic producer is eliminated.

However, motive or intention is not really a workable criterion for operating the administrative system. The application of a test of motive would involve looking into the mind of an exporter in another jurisdiction; it would involve surmising what were his ideas as to his future course of conduct. The difficulties of securing reliable evidence on the basis of which an informed and fair judgement can be made are obvious. All that can be known with any degree of certainty by the authorities of the importing country are the extent of the dumping and then the impact on the domestic industry. Accordingly, the U.S. and Canadian systems have evolved around tests or inquiries into two essentially factual matters. First, is there dumping? Secondly, is there injury to the domestic industry caused or threatened by that dumping?

The existence and extent of dumping and the existence of injury are difficult matters to establish. They may be becoming more difficult to establish than it was when Jacob Viner made his classic study. There is, of course, dumping that is overt and sometimes inadvertent. A firm in one country, dealing at "arm's length" with an importer, may feel compelled by market forces to sell at a price that will be held to be dumping. Such a firm, in order to clear a surplus or to make its entry into a new export market, may sell goods at a sacrifice price that may be determined to be a dumping price.

But the more important form of dumping is that carried on by major transnational firms with sales or manufacturing subsidiaries in various countries. Dumping by such corporations may take a variety of forms, all of them difficult to detect and, if detected, difficult to measure. For example, a fully integrated manufacturing company, which makes components and assembles them into a final product in one country, may export components at marginal cost to its subsidiary in another country for assembly there. An independent firm in that country, without a source of components at prices equal to the marginal costs of the parent of its domestic competitor, may not be able to compete. The production of the components in the importing

country may be precluded; this would be a case of what Article VI describes as "materially retards the establishment of a domestic industry." Only if the competitor decides that the lower price of the final product is because of dumped components is the matter likely to come before the authorities. Yet such dumping may well be predatory in Viner's sense.

Again, a parent firm and its subsidiary, each exporting a range of products to the other, may so arrange their various transactions that the stated prices for imports into each country do not show dumping. Each firm is receiving more, on paper, for its exports than the real transfer prices to its affiliated firm, and each is paying more for its imports from its affiliated firm than it would pay in normal commercial circumstances in the absence of the threat of anti-dumping measures. This sort of pattern of transactions is difficult for a competitive producer to discover. The real inhibition on such dumping is the scrutiny given by the national tax authorities, not by the customs authorites, to transfer prices in transactions that are not at "arm's length." In this context, the provision in the "Illustrative List of Export Subsidies" in the Subsidies/Countervailing Agreement enjoining "arm's length" pricing between affiliates (footnote 2 to that list) is relevant.

Again, a firm operating in a variety of jurisdictions may use a tax haven, transferring legal titles to goods through a third country while shipping the goods from the one country to the second. Clearly, a multinational corporation can minimize the risk of being found to be dumping with an ease that an exporter selling at "arm's length" cannot easily match. With the growing importance in international trade of multinational or transnational corporations, dumping may well be of increasing importance but diminishing visibility.

From a U.S. perspective, and as a practical matter, the anti-dumping mechanism is now the centre-piece of the structure of legislation that affords relief against import competition. The test of *material* injury is presumably easier to pass than the test of *serious* injury; accordingly, producers in the United States seeking relief against import competition will avoid the escape clause route if they can[3] and will try to establish either that there is dumping or that there is subsidization. But recourse to countervailing duties necessarily involves the interests of another government, whose subsidy policy and subsidy practice are at issue. Thus producers will conclude that it is better to try to establish that there is dumping and try to secure the application of that remedy. After all, what is at issue in a dumping case is the pricing practice of an individual firm or firms, and the potential impact of those prices on producers in the importing country.

It is important to keep in mind that anti-dumping legislation has developed in a broad sense as a counterpart in trade relations practice

to legislation providing penalties for damaging price discrimination in domestic commerce. In the United States, legislation on price discrimination is set out in the Robinson-Patman Act of 1936, which empowers the Federal Trade Commission to issue a restraining or prohibitive order. That act states that sellers may not "discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . or to injure, destroy, or prevent competition with the firm engaged in price discrimination." Professor Metzger, in a study published before the Tokyo Round began, drew attention to the important fact that in the U.S. system, dumping was becoming subject to a greater degree of discipline than was price discrimination arising in the domestic market.

> The Antidumping Act . . . imposes a dumping duty on the importer of foreign merchandise [that is dumped] . . . if an industry in the United States is thereby being injured. In both cases Congress intended to eliminate the use of price-cutting tactics that impair the competitive position of domestic sellers. The Antidumping Act applies, however, without regard for the competitive structure of the industry being affected by price discrimination. . . . The Antidumping Act . . . has been administered without regard to the anticompetitive impact of duties imposed on lower priced imports at the behest of domestic monopolists, oligopolists, or cartels[4]

This is certainly the case under the Trade Agreements Act; the ITC is permitted to make a finding of material injury even though there is a lack of competition within the domestic industry.[5]

More recently, Peter Ehrenhaft, who served in the late 1970s as deputy assistant secretary of the treasury in charge of anti-dumping investigations, has commented:

> In light of the fact that the antidumping and countervailing duty legislation has as its express purpose the prevention of "unfair competition," the concepts and conventions of competition policy ought to play a significant role in the evolution of the rules and regulations. . . . In fact, . . . competition considerations are given limited scope. . . . [D]omestic levels of prices, technology and adjustment to changed consumer tastes are given short shrift. The laws contain no requirement that . . . the industry . . . be operated "efficiently."[6]

Here is a major issue that will need to be examined internationally and, more importantly, nationally. It is not unlikely that much the same comments could be made about the Canadian anti-dumping system, for example, if it were to be compared with scrutiny of

domestic price discrimination under the Combines Investigation Act.[7] A thorough examination of this issue would perhaps lead in due course to additional provisions in the Anti-dumping Agreement.

Countervailing Duties

The countervailing duties system is so complex that there can be no really satisfactory alternative to a detailed examination of the whole U.S. legislative system: statutes, rules, the Statement of Administrative Action, House and Senate Committee *Reports*, House and Senate *Records*. The most that can reasonably be achieved here is to comment on some key considerations.

The countervailing duty system originated in the United States when it was realized that foreign governments were subsidizing certain products in order to offset the U.S. tariff, thus negating the decision of Congress to give certain levels of tariff protection to particular industries. Thus, as the system developed from 1890 to the Trade Act of 1974, countervailing duties were thought to be necessary only for dutiable imports. No foreign government would subsidize because there was no tariff to offset, or, if subsidies were paid to offset some other disadvantage facing that exporter, no action would be desirable.[8]

Duty-free goods were made subject to countervail by the Trade Act of 1974.[9] Because the GATT Protocol of Provisional Application covered only mandatory legislation in existence at the time the United States signed the GATT, an injury test was required in regard to countervail on duty-free goods. The wording of this injury test was based on the anti-dumping legislation. In the same set of amendments, authority was given to the secretary of the treasury to set aside any countervailing duty during the four-year period January 1975 to January 1979; this was designed to reduce the risk of a retaliatory trade war developing during the Tokyo Round, and to provide an incentive and a timetable for the subsidies/countervail negotiations.

During the negotiations, two competing concepts about subsidies as an issue in trade policy were in play. The first is what one might call the U.S. or the congressional view. This preception was that the United States subsidized production and exports to no great extent; moreover, that the use of subsidies in the United States was declining; that other countries, particularly the EEC and developing countries, and, of course, Canada, were subsidizing more and more; and that the Tokyo Round was the one chance to reverse all this. In particular, EEC export "restitutions" for agricultural exports caused problems in the U.S. market, for example, cheese, ham, butter cookies, and in potential U.S. (and Canadian and Australian) export markets, for example, the Japanese market for coarse grains.

The view competing with this U.S. perception was that many, if not all, governments were subsidizing industrial development and, more particularly, that most, if not all, were subsidizing agricultural and fisheries production and exports. Moreover, the countervail system dealt, in a rather punitive fashion, with only one sort of injurious effect of subsidization: that is, the displacement of domestic production in an importing country by subsidized exports from another. Comparable remedies were not easy to devise for those subsidies that resulted in damage to producers by increased competition in third markets or by replacing exports by subsidized production in the domestic market. To Canada, this aspect of the subsidy issue was equally as important, if not more important, than the problem of subsidized imports. For example, the British have subsidized aluminum production in Britain and thus adversely affected the exports of Canada; this is an import replacement subsidy.

Further, subsidies designed to encourage industrial development in regions of low employment or underdevelopment were important aspects of national economic and social policy in certain countries, the EEC and Canada included, where it appeared that there were greater disparities in incomes between various regions than there were in the United States.

On this view, other countries, such as Canada, argued that one aim of the negotiation should be to ensure that countervail could be used only when subsidized imports were having a decidedly damaging impact on producers in the importing country, an impact that could not reasonably be expected to be politically tolerable. A second, and parallel, aim of any negotiation should be to strengthen the remedies available for subsidies that led to damaging displacement of unsubsidized or less-subsidized exports, either to third markets or by import replacement.

The logic of the congressional view meant either that there should be no injury test for countervail or, at best, that the threshold of injury be relatively low. The logic of the second view would require a higher threshold of injury; it led directly to the conclusion that countervail, involving as it does the offsetting, in whole or in part, of the policy of one government by the application of a punitive import tax by another, should be a weapon of last resort.

The second of these two perspectives on the subsidy issue came to be accepted to a rather greater degree during the course of the negotiation, particularly as other delegations drew to the attention of the U.S. representatives examples of U.S. subsidies and their impact on decisions to invest in the United States, particularly the decision by the Volkswagen automobile company to locate a plant in Pennsylvania facilitated by subsidies.[10]

However, the congressional or U.S. view remains, as will be clear from the *Record* of the Senate debate on the Trade Agreements Act.[11]

The other view that countervail should be a weapon of last, not first, resort, and to be used with discretion, is also partially reflected in paragraph 1 of Article 4 of the agreement: "It is desirable that the imposition . . . be permissive. . . ." This wording is not reflected in the new U.S. legislation, which provides for discretion *not* to give relief in regard only to "fair," and not in regard to "unfair," import competition.

The concept of countervail as a discretionary device was perhaps most clearly set out in the opinion of the majority in the Hammond Lead case.[12] They observed that the secretary of the treasury must have discretion to not countervail against subsidies that are much the same in kind and effect as those available in the United States. To countervail in such circumstances would open the United States to criticism. An argument along these lines was advanced in the Geneva discussions, particularly as it concerned the position of multinational companies. For example, a U.S. company might have accepted subsidies for the setting up of a factory in the United States, primarily, no doubt, to serve the U.S. market. Its subsidiary in another country, say, Canada, might also have accepted subsidies to build facilities there to serve that domestic market. But if another firm were to accept subsidies in Canada and any significant portion of the resulting production were to be exported to the United States, the U.S. producer might petition to have countervail applied.[13] The question of whether in such circumstances it should be open to the U.S. parent firm to complain of such subsidized imports was an issue that was raised by the Canadians in Geneva, but never pursued to a conclusion.

There is obviously a complex of issues relating to the activities of multinational corporations that may accept subsidies in some jurisdictions and may invoke countervail to partially offset the subsidies accepted by their competitors, which the code does not address. It can be assumed that rules dealing with these issues would be opposed by the United States, because they would inevitably limit the scope for recourse to countervail by U.S. firms.

One feature of the U.S. countervailing duty system, as it existed before the Tokyo Round, which was in contrast to the anti-dumping system, was that there was little in the way of provisions regarding procedures and only limited scope for judicial review.[14] Moreover, prior to the Trade Act of 1974, an *importer* could challenge the determination that a bounty or grant had been paid on the imported goods (but not the finding as to the amount), yet there was no provision for a U.S. producer to appeal and for judicial review of a negative finding. In the 1974 act, provision was made for a right of appeal and for recourse to the Customs Court (now the International Trade Court), and then to the Court of Customs and Patent Appeals, by a U.S. manufacturer, producer, or wholesaler.

What Is a Subsidy?

The key question "What is a subsidy?" is answered in part in the new U.S. legal provisions. There are several important points to note.

The first is that the act itself, the Senate Committee *Report*, and the statements of various senators have made clear that "subsidy" in the new law is the same as "bounty or grant" under the previous U.S. law. This means that the few decisions of the courts under the old legislation and, indeed, the determinations by the secretary of the treasury as to what was and what was not a bounty or grant, continue as precedents. One difficulty is that the published *positive* determinations prior to 1975 give little detailed information; moreover, there was then no requirement that negative determinations be published. For example, in arriving at a positive finding in regard to steel-belted radial tires exported from Canada to the United States, it was understood that the Treasury concluded that the provision of a special sewage system by the small municipality where the Michelin factory was located (the existing system not being able to handle the waste to be generated) was *not* a subsidy, that is, if the cost of the system was recovered from this user, on the same basis as from other users. The logic was that sewage systems were normally available in prime industrial locations. However, this detail of a Treasury decision was not published. In the same case, the Treasury concluded that accelerated depreciation for capital items under the corporation income tax provisions, if such accelerated depreciation were offered only on a regional basis, was a countervailable bounty or grant. The value of this decision as a precedent was established because it was noted in the published finding.[15]

There are a number of decisions by the courts that do give guidance, unless it is determined that they have been altered by the new statute. For example, in the Zenith case,[16] the courts confirmed that the exemption of exports from a commodity tax levied on products destined for domestic consumption was not a bounty or grant, despite the view held in congressional circles that countries that rely heavily on commodity taxes rather than on taxes on incomes and profits have an unfair advantage in foreign trade. (This was the "border tax adjustment" issue; the President had been directed to seek new rules to regulate this issue.)[17] In a later Treasury decision, the payment of what was stated by the Canadian authorities to be a grant for research and development was held to be a countervailable bounty or grant.[18] However, the decision, which set out the rationale rather more fully than had been the practice before 1975, made clear that the finding related to the particular payments in this particular case. The observation was made that the company concerned had filed for a patent two years before applying for a grant. It was not a finding that research and development grants *per se* were bounties or grants on

"manufacture, product or export," which are the categories of subsidies that Article VI allows to be countervailable.[19]

In the 1979 act, the section defining "subsidy"[20] makes clear that a subsidy includes "the assumption of any costs or expenses of *manufacture, production*, or *distribution*" (emphasis added). Thus the section is not explicit as to whether the costs of research and/or product development are part of such costs. The agreement, however, does refer to subsidies for research and development (in paragraph 3 of Article 11, dealing with subsidies other than export subsidies), but it is not clear from the agreement that *all* subsidies of the various types listed in this article are taken to be countervailable under Article VI of the GATT. That article permits countervail to be levied in regard to subsidies that may be consistent with the GATT but is limited to those that are subsidies on "manufacture, production and export." However, the Senate Committee explicitly added "expenses for research and development" to the scope of this definition. This is "legislative history."

A second important development concerns "offsetting." The Treasury had followed the practice of deducting from the gross amount of a subsidy certain sums to arrive at the "net amount or net subsidy." The act introduces the concept of "net subsidy" and provides for specific deductions, namely, any application fee or deposit required to qualify for the subsidy, any loss due to deferral of payment, and any export tax imposed to limit the amount of the domestic subsidy on exported goods. As the Senate Committee *Report* makes clear, this list is "all inclusive," and the *Report* specifically disallows the previous practice of deducting from a regional economic development subsidy the increased costs incurred by a firm in locating in a less-than-prime location. This concept had been developed by the Treasury in discussion with the Canadian authorities after the decision to impose countervailing duties on imports of steel-belted radial tires from Nova Scotia, produced in facilities that had received assistance from the Canadian federal government under its Regional Economic Expansion Program, as well as from the provincial authorities. While the "offsetting" exercise was not, in fact, carried through to a conclusion in this case,[21] the Treasury did follow this practice in some later cases involving imports from the EEC. This development regarding "offsetting" has now brought back within the scope of U.S. countervail the gross amount of such regional economic development subsidies, a type of subsidy of considerably more importance to Canada than to the United States.[22]

A further element in the definition of subsidy is the proviso attached to the illustrative list of domestic subsidies[23] which, on the face of it, limits the concept of an actionable domestic subsidy, that is, "if provided . . . to a *specific* enterprise or industry, or group of enterprises

or industries" (emphasis added). This may be compared with the declaratory language of the agreement (paragraph 3 of Article 11), which asserts that "Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, *inter alia*, by means of subsidies granted with the aim of giving an advantage to certain enterprises." At a later point it is stated that "The Signatories note that the above forms of subsidy are normally granted either regionally or by sector." There does not appear to be the same normative connotation to these factual observations as there is in the passages in the U.S. legislation.

The U.S. language may be designed to have the effect of excluding from the scope of definition of countervailable subsidy any general tax-spending or expenditure subsidy of truly general application such as the U.S. investment tax credit.

A further element in the U.S. definition of "subsidy" is the stipulation that a subsidy may be provided, not only by a government, but also by a "private party." In many jurisdictions, there are parties that are nominally or in a formal, legal sense private, but that perform governmental functions, perhaps using government funds or raising money through the exercise of some licensing or marketing function that they are authorized to perform. A case can be made for approximating the subsidizing activities of such bodies to governmental subsidies.

The practice is common enough in the agricultural sector. However, if a private corporation, say, General Motors, subsidizes an independent supplier to carry out certain research and development costs for, say, a component required by General Motors, is one to consider that sales by the independent supplier of that component to third parties are "subsidized" in the sense of Article VI? There is no guidance either in the United States legislative history or in the record of discussions in Geneva. However, if one substitutes "British Leyland" for "General Motors" in this paragraph, the problem of so-called "private" subsidies becomes evident.

A final comment on the definition of subsidy concerns the Illustrative List of prohibited export subsidies (Annex A to the Agreement). This list has been taken into the U.S. legislation by reference.[24] This seems to mean, *inter alia*, that the United States has accepted by legislation that the deferral of direct taxes specifically related to exports (when an appropriate interest charge is not levied in regard to such deferral), that is to say, DISC, is a countervailable subsidy. This is not quite the same as saying that the United States has agreed in its legislation that such a tax deferral is prohibited. To the extent that this is done, it is only by the general language approving the Tokyo Round agreements, in section 2 of the Trade Agreements Act.

Of course, U.S. law does not preclude countervail from applying to those subsidies which the agreement states are not in the category of

prohibited subsidies. For example, the proviso to item (k) of the Illustrative List makes clear that with regard to export credits, an interest rate on such a credit no lower than the rate provided for in the so-called "Gentleman's Agreement" shall not be considered as being a prohibited export subsidy. But such a subsidy is countervailable. The U.S. legislation is, on this point, consistent with the concept of Article VI of the GATT. That article permits countervail against injurious subsidies whether or not they are consistent with the GATT. The more interesting question, therefore, is whether, having "approved" a list of prohibited subsidy practices, Congress will feel any obligation to bring U.S. subsidy legislation into conformity with these terms of the agreement.

Common Features

We turn now to a number of features of the new U.S. legislation that relate both to countervail and to anti-dumping. These features are "material" injury, causality, the regional market question, "critical circumstances," the central role of "undertakings" in the two systems, the definition of "like product," the provisions regarding state-controlled economies, and the provisions regarding procedures.

Injury: The Concept of "Material" Injury

Prior to the Trade Agreements Act, the anti-dumping provisions referred only to "injury." As a practical matter, the issue of whether there was a difference between "injury" as applied by the Tariff Commission and the GATT concept of "material injury" prior to the Kennedy Round did not appear to be of great importance. In 1964, however, the question was raised, in the dissent of two commissioners, whether material injury was something less than injury that was "fatal, permanently crippling or universal." Consideration of the problem in these terms led to the formulation of the proposition that any degree of injury that was more than *de minimis* (trifling) was material. This view was reflected in certain Tariff Commission findings prior to 1975.[25]

After the Kennedy Round, the representatives of other countries became more aware of the various views held in Washington regarding the injury concept. They noted the concern in Congress about this central concept, as revealed in Congress' examination of the Anti-dumping Code, particularly in the Senate Finance Committee.[26]

In the Tokyo Round, U.S. representatives urged, and a number of other representatives accepted, that it would be desirable, in any reference to an injury test in any agreement on countervail, that the word "material" be avoided, and that other language be used in its place to serve the same purpose as that adjective. The U.S. representatives pointed out that, as a practical matter, the notion that any injury

that was more than merely trifling (*de minimis*) was material was no longer being reflected by the ITC in its findings under the anti-dumping provisions. However, given that the ITC was not guided by precedent, this was not all that reassuring. The problem of how to qualify the word "injury" remained. Moreover, in a meeting of the GATT Anti-dumping Practices Committee during the course of the Tokyo Round, the U.S. representative was formally asked whether or not, if the word "material" were in the U.S. law, any ITC decisions would have been different. The U.S. answer was "no." It was the position of the United States that the injury determinations of the Tariff Commission (after 1975, the ITC) had been consistent with the material injury criterion of Article VI and of the code.

This position was a further lesson on the point that the GATT obligations are about actions, not about words. It was what the United States had done — the actual determinations in the various cases, in the light of the facts of those cases — which were for consideration. No representative of any other country believed that this U.S. assertion was unacceptable or that they could argue that any particular U.S. injury determination was not in accord with the material injury criterion. This did not mean, of course, that it was accepted that the word "material" was irrelevant, or meaningless, or unnecessary. It was a view of U.S. actions, not of hypothetical possibilities.

Given these considerations, language was worked out for the injury article of the Subsidies/Countervailing Agreement (Article 6), which it was thought would define the degree of injury. Paragraph 2 of that article uses the word "significant" four times. The link to the word "material" was provided by footnote 1 to Article 2; this footnote was agreed after paragraph 2 of Article 6 was in virtually final form. It was not surprising, therefore, that the draft of the Trade Agreements Act put before Congress did not use the word "material" but that the language of paragraph 2 of Article 6 of the agreement was taken into the draft.[27]

The absence of the word "material" in the draft legislation was commented on by the Commission of the EEC.[28] In the light of these representations, the bill was redrafted to use "material" and to define it. One element in the definition was that, in general, the standard of injury applied by the ITC under the Anti-dumping Act from 1975 (when the Trade Act was enacted) to the time, July 1979, when the Trade Agreements Act was being considered, was made the standard of material injury. Given that during this period the *de minimis* concept was not being used, this definition may seem helpful from the point of view of those who believe that anti-dumping duties, and particularly countervailing duties, should be used only when there is some degree of damage, actual or threatened, to domestic producers that may be less than serious but certainly significantly more than

merely trifling. What the definition also means is that the addition of the word "material" has, in fact, made no difference in the sense of bringing about a higher threshhold of injury.

An additional and more precise definition of material injury was thereupon inserted: "In general, the term 'material injury' means harm which is not inconsequential, immaterial or unimportant." This definition is not, on the face of it, a strong formulation. It suggests that the threshold of injury in anti-dumping and countervail cases is to be markedly lower than for "serious" injury.

That such a weak definition would be developed by congressional draftsmen if there were pressure to use the word "material" could be, and perhaps was, foreseen. It may be that the officials of the Commission of the EEC, recognizing that, in a trade policy system centred on the concept of "contingent" protection, they might have to use their own anti-dumping system more vigorously than in the past, concluded that a definition of material along these lines would be helpful to them.

The record of findings since the Trade Agreements Act came into force has been examined by Matthew Marks, the distinguished Washington trade lawyer, who has set out his conclusions in a letter to a senior official of the State Department. Mr. Marks stated, in part:

> The ITC has applied the material injury standard in sixteen anti-dumping determinations (preliminary and final) from January 1, 1980 to date. Eight of these decisions were affirmative with respect to injury, and eight were negative. The Commission issued seventy-seven preliminary and final anti-dumping determinations from January 1, 1975 to January 1, 1980 under the simple injury standard of the Trade Act of 1974. Thirty-eight were affirmative and thirty-nine negative. This record would appear to provide striking confirmation, insofar as dumping is concerned, of the accuracy of the prediction in my Tokyo speech that "the ITC determinations with respect to the injury criteria under the new law will probably be not too different from what they have been since enactment of the Trade Act of 1974, even though the earlier legislation did not provide for a *material* injury standard.
>
> The picture is not quite as clear in the countervailing duty area. . . . The ITC has applied the material injury standard in fourteen preliminary and final countervailing duty determinations from the beginning of the year to date. Only two of these were affirmative, and twelve were negative. In addition, seven injury investigations were terminated during this same period as a result of requests by the petitioners to withdraw their complaints. This record can be compared with the Commission's countervailing duty injury determinations under the Trade Act of 1974 in cases where duty-free imports were found by the Treasury Department to be subsidized.

From January 1, 1975, to January 1, 1980, the Commission issued nine such determinations applying a standard of simple injury. There were two final determinations of injury in these cases and seven of no injury.

I can only conclude from the above record that the substitution of a material injury standard for the prior standard of simple injury under the Trade Act of 1974 has had little, if any, effect on the Commission's administration of the Anti-dumping Act and countervailing duty law to date. What has undeniably had an impact was the addition of a new injury standard to the countervailing duty law in the case of dutiable imports, where there was previously no standard of injury whatsoever.[29]

That is a definitive comment on the relevance of the word "material." The other question of whether the concept that material is anything more than *de minimis* has really been abandoned is not clear from the record. The related but separate question of a subsidy (or a margin of dumping) that is *de minimis* is raised, for example, in the tentative determination to revoke the countervailing duty determination on glass beads from Canada.[30] In this order, countervailing duties are assessed at 0.9 per cent for imports for the period 2 September 1976 to 31 December 1976, and at 0.53 per cent for calendar year 1977. Thereafter, the rate of subsidy judged *de minimis* (0.43 per cent) having been in effect for two years, no further countervailing duty is to be levied. The exporter agreed that customs regulations would be suspended, and a duty imposed "if appropriate" if a net subsidy is received that is not "*de minimis*."

This issue of whether the test of material injury is sufficiently rigorous in U.S. law and practice is likely to be a key issue in regard to the various anti-dumping cases regarding steel imported from the EEC recently launched by U.S. steel producers.

Causality

The change in the wording of the language about the causal link between dumping or subsidization and injury also has a bearing on the meaning of "material injury." During the negotiation of the Kennedy Round Anti-dumping Code, negotiators were faced with two rather conflicting usages. One was in the language of the U.S. Anti-dumping Act, which spoke of injury occurring "by reason of" dumping. The other was its use in the escape clause in the Trade Expansion Act of 1962. As noted above, it was and still is used in the escape clause as though a state of being injured is a state of being in ill-health, rather than that the ill-health is the sum of the various injuries, ailments, and adverse impacts of various events or decisions external or internal to the industry. The phrase "by reason of" implies that the concept of

injury is a "separable" concept; an industry can be suffering from various injuries. On this view, what is at issue in an anti-dumping or a countervailing duty inquiry is whether there is an injury caused by the relevant external factor and whether that particular injury (*not* the general state of ill-health of the industry) is a material injury. In such an inquiry, any competent administrator would look at all the various factors impacting on the industry in order to ensure that an injury caused by one of these factors is not incorrectly attributed to the effect of dumping or the impact of the subsidization of imports.

Following this line of reasoning, the long-established wording of the U.S. Anti-dumping Act ("by reason of") seems more logical than the "principal cause" concept of the Kennedy Round Anti-dumping Code. The discussion about that code in the Senate Finance Committee, and some of the subsequent academic analyses of the issue,[31] suggests that it is not understood or accepted by U.S. specialists that an inquiry into whether there is an injury caused by dumping or subsidization can be considered as being quite different from a general examination of the industry's state and prospects.[32]

If injury is separable, it follows that the requirement that that degree of injury caused by dumping or subsidization as warrants action be itself a material injury is a stronger, not weaker, formulation than one which implies that it is necessary to establish only that the *sum* of the effects of the adverse factors impacting on the industry be material injury, and that dumping (or subsidized imports) be the principal among the various adverse factors. It is not apparent that all the senators considering the drafting of the 1979 act accepted this logic. Many of them still use the injury concept in the general or all-embracing sense rather than in the separable sense.[33]

The view that injury was a separable concept, and that the two agreements should abandon the "principal cause" wording and be drafted in conformity with the causality language of Article VI of the GATT, of the U.S. Anti-dumping Act, and of the Canadian Anti-dumping Act, prevailed in the Tokyo Round discussions.[34]

Regional Injury

The provision for determining that the producers in a region of the United States are an "industry" for the purposes of the anti-dumping provision and for the countervailing duties provision carries into U.S. law the relevant provision of the two Tokyo Round agreements.[35] The wording of the U.S. legal provision is very close to the wording of the agreements, but the U.S. formulation is somewhat clearer.

During and after the Tokyo Round, it was noted in discussions in Geneva that the new provisions represented a weakening of the regional industry provisions of the Kennedy Round code (Article 4 (a) (ii)). This is, in a sense, correct, but the important point is that this

particular provision in the Kennedy Round agreement was one of the features of that agreement that was unacceptable to Congress.[36] By the time of the Kennedy Round, there had been a number of determinations of injury by the Tariff Commission in cases in which the imports had been more or less concentrated in one area of the United States,[37] and the adverse effect of such imports felt largely by producers in that region. Given that the U.S. government was constitutionally unable to levy an anti-dumping duty on imports destined for only one region, these findings had seemed to impose a particularly harsh penalty on the firms found to be dumping injuriously in this sense. Their dumped exports to other market areas of the United States were subject to anti-dumping duties even though it had been established that such dumped exports had not caused injury. Accordingly, in the Kennedy Round the British and the Canadians, who had been involved in such cases, with the support of the Commission of the EEC, pressed the U.S. representatives to agree to a restrictive definition of a "regional" market.

However, the Kennedy Round draftsmen were too clever. If the purpose of the draft was to limit the scope for action by the United States it was a failure, because Congress would not accept this form of words.

During the Tokyo Round discussions, it became clear that a revision of the Anti-dumping Code might well provide an opportunity to redraft this provision; a comparable provision would obviously be necessary for any agreement on countervailing duties. From the point of view of the Commission of the EEC, it had become important to have a workable text on this issue, against the day when anti-dumping and countervail duties would have to be applied in relation to the Community as one customs territory as had been envisaged in the Kennedy Round agreement (and carried forward into the Tokyo Round agreements).[38] Accordingly, the text worked out in Geneva attempted to describe a regional industry in more realistic terms, and thus to allow the use of these remedies where there was a separate industry in a separate region, precluding their use when the degree of separation from the rest of the national industry was relatively slight.

This provision of the U.S. law has now been employed in several ITC preliminary inquiries[39] into injury and also in one of the transitional cases, *Fish from Canada*, under the countervail provisions.[40] In this latter case, it was determined that the criteria of a "regional industry" were met, but "no injury" was found on other grounds. The injury inquiry in regard to the dumping of liquid caustic soda from the Federal Republic of Germany, France, Italy, and the United Kingdom[41] was not a particularly rigorous test of the new provision, in that the sales from U.S. producers outside the regional market concerned (the northeast area) had quite clearly been important in

supplying customers in the area. The "supporting statement" by the ITC director of operations noted that the northeast area "does not qualify for the definition of a regional market under the anti-dumping statutes because it is served to a large extent by U.S. producers whose production facilities are located outside the region. . . ."[42] Commissioner Stern addressed the question of regional industry. She noted that there were two tests that had to be met: "the domestic producers must sell all or almost all of their production in the area and the demand for the produce in that area cannot be supplied to any significant degree from the United States producers not located there. Both conditions must be met." Commissioner Stern was of the view that because the second test could not be met, the industry could not pass the regional industry test. It will be noted that Commissioner Stern, perhaps inadvertently, used the phrase "cannot"; the agreement and the statute both say "is not." In the subsequent reasoning, Commissioner Stern applied the "is not" concept, referring to actual sales into the northeast area.[43]

A much more relevant recent case is that concerning *Sugars and Syrups from Canada*.[44] Dealing with the regional market issue, Vice-Chairman Alberger and Commissioner Calhoun stated:

> The record of this investigation establishes that appropriate circumstances exist for treating the Northeastern States region as a separate industry. An average of over 96 percent of the sales of the plants located in the Northeastern States region were to customers in that region during the period 1975–79. This clearly constitutes "all or almost all of their production." . . . Only about 5.5 percent of the sales of producers located in States outside the region were to customers within the region. We consider this amount to be insubstantial. Finally, there is the concentration of dumped imports into this region, since less than one per cent of Canadian imports enter customs districts in States outside the Northeastern States region. Of Canadian imports entering customs districts in the Northeastern States region, only about 3.3 percent were sold in States outside the region.

This determination has raised important issues regarding procedure and substance. The Canadian firms concerned took the view that the ITC had miscalculated the sales of producers in the United States outside the region to customers in the region, and they therefore appealed to the Court of International Trade to set aside the finding. It appeared that before the court made its decision on the appeal, the ITC realized that it was not the portion of the total sales of outside producers to customers in the region that was relevant, but rather, as the code and U.S. law require, the portion of demand in the region that is satisfied by domestic producers located outside the region. This

appeared to be in the range of 12 to 16 percent. The court, however, was not prepared to say that this was not "to any substantial degree." (There were a number of other issues also raised by the Canadian firms.) Accordingly, the anti-dumping order was "vacated" and the issue sent back to the ITC for a "redetermination," which, when it would be made, would be submitted to the court. In their new finding, two commissioners found that a regional industry did exist and made a new positive determination, one dissented, and three did not participate. The key passage in the opinion of the two commissioners is as follows:

> . . . the corrected figures show that the percentage of demand within the region for domestic sugar which was supplied by producers located outside the region ranged from 11.6 to 12.6 percent. We do not believe that common parlance, itself, suggests that this range is substantial. "Substantial" is relevantly defined in *Webster's Third New International Dictionary* as "considerable in amount, value or worth." On its face, 12.6 percent does not raise a question as to whether there is a "considerable" quantity or amount of nonregionally produced products being consumed in the region. In fact, if 12.6 percent of demand for domestic goods is supplied from elsewhere in the United States, then 87.4 percent of that demand is supplied by regional producers. Such a high level of isolated supply and demand, alone, suggests a rather high degree of isolation in production and consumption.[45]

If their definition of "substantial" is allowed to stand, it will become a criterion for defining a regional market, and may possibly be the basis for a number of investigations into exports from Canada. The implications of this logic should also, of course, be looked at in terms of the existence of regional markets in Canada.

The regional issue was also examined in a case involving steel wire nails imported into the western United States from the Republic of Korea. The discussion by the three commissioners in the majority is too extensive for quotation here but may be summed up in the following comment:

> The record indicates that appropriate circumstances exist for treating the Western States region as a separate industry. Producers within the region sell more than 80 percent of their production of nails therein, principally because nails are heavy and costly to transport long distances, and only about 1.5 percent of consumption in that region is supplied by companies located elsewhere. The 'concentration of subsidized or dumped imports' criterion is met in that about 43 percent of imports from LTFV suppliers enter the Western States although that region accounts for only 20 percent of total U.S. consumption.[46]

The issue was further examined in the case involving asphalt roofing shingles from Canada. This was a preliminary investigation in which it was determined that there was no reasonable indication of injury. Because this finding was based on considerations other than those relating to the question of whether or not there was a regional industry, that issue was not examined in detail.[47]

These various cases suggest that the regional market and regional industry issues will be important in U.S. anti-dumping and countervail cases. The fact that several of them involve Canadian exports is not surprising, given that Canadian exports tend to go to nearby regions of the United States, rather than to be destined for the whole of the United States market.

It should be noted that in the Canadian system, the Anti-dumping Tribunal is directed by the act to take the regional market provisions of the code "fully into account." The *Discussion Paper* examines this issue briefly.

Critical Circumstances

Another feature of the new U.S. legislation to consider is the concept of "critical circumstances," which appears in both the anti-dumping and countervail provisions in different forms, reflecting the different provisions of the two agreements.

The origins of this particular formulation are those paragraphs in the Kennedy Round Anti-dumping Code that provided for an additional remedy in regard to so-called "sporadic" dumping, that is, dumping in a relatively short period of time of relatively large quantities of goods. Such dumping may have a particularly damaging effect on domestic producers, damage that cannot be remedied by the levying of an anti-dumping duty on imports that enter *after* a preliminary finding. The necessity for a special remedy to deal with "sporadic" dumping was urged by Canadian representatives, who noted that it had often been the case that large quantities of textiles and clothing were dumped in Canada from the United States on a "hit-and-run" basis. Given that the Candian market for particular textile products was of the order of one tenth of the U.S. market, a quantity of goods that a U.S. producer might wish to export at a distress price could have a substantial price effect in Canada. Canadians argued that there had to be some provision for reaching back in time to apply a duty to such dumped imports, but only after such dumping had been found to be injurious. The resulting provision (Article 11 (ii) (a) of the Kennedy Round code) was an exception to the general rule limiting the retroactive application of anti-dumping duties.

This provision was carried forward, with only technical drafting changes, into the Tokyo Round revision of the Anti-dumping Code and

is reflected in new provisions in the U.S. legislation.[48] The U.S. language is perhaps less rigorous than the agreement language. First, the agreement provides, as one of the tests, "that there is a history of dumping *which caused injury*." The emphasized words do not appear in the Trade Agreements Act. Secondly, the agreement provides an alternative test: "that the importer was, or should have been, aware that the exporter practices dumping *and that such dumping would cause injury*." The emphasized words do not appear in the Trade Agreements Act. Thirdly, the agreement specifies that the test is related to the "dumped product in question." The Trade Agreements Act applies the first alternative test to "a history of dumping . . . of the class or kind of the merchandise which is the subject of the investigation." We must wait for a case to show whether this has the effect of broadening the scope of the U.S. legal provision to an extent greater than that provided for in the agreement.

These comments should be taken in the context that the agreement clearly contemplates punitive action against "hit-and-run" dumping. It was recognized that this was a particularly damaging form of dumping and that governments needed to be able to show that they could deal with it in a punitive manner. It was intended, of course, that the availability of this punitive measure would effectively discourage such dumping. To date, there is only one case in Canadian practice in which these provisions have been invoked.[49]

The "critical circumstances" provisions of the Subsidies/Countervail Agreement and of the Trade Agreements Act were modelled on these anti-dumping provisions. Both provisions depend on a finding that it is necessary to apply a retroactive duty in order to prevent such injury recurring.

The agreement also limits the scope for such action, in regard to countervail, to those export subsidies that are paid "inconsistently with the provisions of the General Agreement or of this agreement," and this is reflected in the Trade Agreements Act. It may seem objectionable that this scheme involves the domestic authorities of one contracting party making a determination as to whether or not a subsidy paid by another contracting party is inconsistent with the General Agreement; most negotiators would prefer that such a determination be reserved to the Committee of Signatories or to the Contracting Parties. However, this provision of the agreement is, of course, a limitation on the ability to apply this punitive measure. The alternative would have been to rely only on the other tests such as, for example, that the injury is difficult to repair, that it was caused by massive imports in a relatively short period and that it is deemed necessary to apply the duty retroactively "in order to preclude the recurrence of such injury." (This last proviso has not been taken into the Trade Agreements Act, although the corresponding proviso is in

the act with regard to anti-dumping duties.) The corresponding provisions in Canadian law are at pages 31 and 32 of the *Discussion Paper*.

Undertakings

The concept of "undertakings" plays an important, even central, part in the new Anti-dumping and Subsidies/Countervail Agreements. It appears in the Trade Agreements Act and figures prominently in the system proposed for Canada in the *Discussion Paper*. It may be useful to review the negotiating history.

Prior to the Kennedy Round, it was the practice of the United States Treasury to withhold appraisement (under the customs provisions) for goods for which there was an anti-dumping investigation under way. However, there were long delays in liquidating customs entries in certain major ports, and any entries that had not been liquidated and that might fall within the category of imports being investigated could become subject to a definitive anti-dumping duty after the Tariff Commission had concluded its inquiry into injury. Importers could thus build up a substantial contingent liability. In these circumstances they were often willing to make a deal with the Treasury to terminate an anti-dumping proceeding, and not to go on to face an injury inquiry. For this they would give an undertaking not to import the goods in question or not to import them at not less than an agreed price.

In the Kennedy Round, representatives of other countries negotiated from the position that this undertaking device was open to abuse. They succeeded in getting agreement on time limits for the period during which imports could be subject to reappraisement for anti-dumping purposes (i.e., the provisions in Article 11 regarding retroactivity), and in Article 7 they ensured that the exporter could insist upon having an injury inquiry. This provision was designed to preclude the U.S. authorities from seeking price undertakings in any case in which the exporter felt that it could not be shown that there was even a threat of injury.

After the Kennedy Round, the administrative practices of the signatories developed in various ways. The EEC would appear to have adopted the technique of using the threat of a detailed inquiry into dumping and into injury to extract price undertakings from exporters. These administrative proceedings are confidential and there is little procedural protection for exporters negotiating with the Commission.[50] The Canadians, in contrast, made no explicit provision in their post–Kennedy Round law for a proceeding to be terminated by the acceptance of a price undertaking; Canadian ministers took the view that such arrangements were too arbitrary and too open to abuse by officials. However, in the new *Discussion Paper*, "undertakings" are elevated to a central role.

In the Tokyo Round discussions, representatives of Japan, the United States, and the EEC attached much importance to filling out the briefly stated provisions of Article 7 of the Kennedy Round agreement. These were, of course, drafted in the informal group that prepared the text on countervail, and then translated into the revised Anti-dumping Agreement. The Japanese seemed to wish to ensure that their exporters would be allowed to negotiate price undertakings. For the EEC and the United States, there was some evidence that undertakings might well become more conspicuous in their anti-dumping and countervail systems.

The relevant provisions in the U.S. law[51] provide a framework of rights for interested parties and a procedural format much more elaborate than, although not inconsistent with, the two agreements. A number of features of the current U.S. law should be noted. The first is the six-months rule, which provides that the investigation may be suspended if the exporters who are alleged to be dumping, or the government giving the subsidy, or the exporters receiving the subsidy, agree to cease exports of the dumped goods, or to eliminate or offset the subsidy, or to cease exports of subsidized goods, within six months of the date on which the investigation is suspended. This six-months grace-period, if one can call it that, applies to undertakings by dumpers to revise their prices, but during the six-months period, exports to the United States must "not exceed the quantity of such merchandise exported to the United States during the most recent representative period . . . " and it must be clear that this result can be realized.

Secondly, a special category of cases is created, those for which there are "extraordinary circumstances." These are circumstances in which

"(i) suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and

(ii) the investigation is complex

"Complex" means —

"(i) there are a large number of alleged subsidy practices and the practices are complicated. . . ."

For dumping, the provision reads:

"(i) there are a large number of transactions to be investigated or adjustments to be considered,

(ii) the issues involved are novel, or

(iii) the number of firms [exporters] involved is large."

For these cases, the "Administering Authority" (the International Trade Administration of the Department of Commerce) may accept an undertaking "eliminating injurious effect if the suppression or undercutting of price levels of domestic products by imports of that merchandise will be prevented . . . " and a 15 per cent rule is followed: for subsidies, "at least 85 per cent of the net subsidy will be offset," and

for dumping, that for each entry the margin of dumping will not exceed 15 per cent of the previously calculated margin of dumping (for that exporter).

Thirdly, no undertaking may be accepted unless the administering authority is satisfied that it is in the public interest, and that "effective monitoring by the United States is practicable." Thus the authorities have, in practice, an unlimited discretion not to accept an offered undertaking.

Fourthly, the investigation, once suspended, can be reopened within twenty days if a U.S. *producer interest* requests it or if, in the case of subsidy, the government concerned makes such a request or, for dumping, the exporter or exporters "accounting for a significant proportion of exports to the United States of the merchandise" in question make such a request.

Fifthly, there are, as provided for in the agreements, provisions for the retroactive levying of duties if an undertaking is violated. There is also provision for civil penalty in the case of "intentional" violation.

Sixthly, there are detailed procedural provisions requiring that before an investigation is suspended because an undertaking has been accepted, the petitioner (the U.S. producer interest) be notified and consulted, and the petitioner be given a copy of the proposed undertaking, including information as to how it will be carried out. Other parties are to be "notified" thirty days before the date of suspension and are to be permitted to submit comments and information "for the record" before the suspension takes place.

These various provisions make clear that if the U.S. industry is willing, it can probably ensure than an anti-dumping or countervail case is terminated by an undertaking. It may well wish to do so if proving injury is likely to be difficult. However, the administering authority is free to decide that it will not accept a proposed undertaking. On the other hand, it would seem most unlikely that an undertaking would be accepted if the domestic producer interest is not satisfied with it.

It will be of considerable importance, in assessing the impact of the "contingent" system, if within this framework undertakings become a frequent method of dealing with countervail and dumping cases in the United States.

By and large, the U.S. legal provisions regarding undertakings seem consistent with the Tokyo Round agreements. Whether or not these provisions will, as administered, adversely affect the interests of exporters will not be possible to determine until there is more experience.

The broader policy issue is whether this is another aspect in which the regulation of price discrimination is more rigorous in regard to imports than in regard to domestic commerce. An American observer has stated:

Although the allowance of suspension appears to be consistent with article 7 of the Code, it seems contrary to basic notions of antitrust policy. Both the Code and the Act condone anticompetitive practices on an international level that are condemned when practiced by members of the U.S. domestic market. By permitting agreements by exporters to raise the price of their merchandise to a level commensurate with the U.S. price for the same product, the Act and the Code are sanctioning agreements to fix prices and limit competition among world producers of the same product. It is precisely such anticompetitive practices that the U.S. antitrust laws were designed to eliminate.[32]

Procedures

One other feature of the revised U.S. anti-dumping and countervailing duties provisions that calls for comment are the provisions regarding procedures. These have been referred to several times above. It would be misleading to try to summarize these provisions, particularly those regarding time limits and the meshing of investigations into dumping and subsidization by the International Trade Administration with the related inquiries into injury by the ITC. These are better examined by study of the legislation itself; interested parties should, when necessary, seek advice from experienced U.S. counsel. Anything less rigorous and detailed could be misleading. However, the comments below may provide a context.[33]

First, the United States continues to adhere to a "split" jurisdiction in antidumping and countervailing duty investigation. The function of inquiry into whether or not there is dumping or subsidization, which previously resided in the Treasury, has been transferred to the International Trade Administration. This unit of the Department of Commerce is the "Administering Authority" referred to in the Trade Agreements Act. The inquiry into injury is carried out by the International Trade Commission, which owes its allegiance to Congress, and is independent of the administration. This split jurisdiction was first introduced in 1954; the Canadians copied this system in revising their anti-dumping legislation after the Kennedy Round.

Split jurisdiction is in sharp contrast with the practice of having only one body of officials responsible for all aspects of an investigation, which was the pre-Kennedy Round system in Britain, and is the system in the EEC. A divided system requires, of course, that there be procedures to integrate, within a prescribed time frame, the two investigations.

Secondly, the United States has revised its procedures to provide for a greater degree of "simultaneity" of inquiry into dumping/subsidization and injury. The provision that when a petition is filed seeking the application of an anti-dumping duty or a countervailing duty, there

should be an immediate preliminary inquiry as to whether or not there is an indication of injury, is an important development.

Some comments on the history of the "simultaneity" issue may help to explain these provisions. Prior to 1954, the U.S. anti-dumping system was administered by the Treasury. Thus there was one group of officials who could stop an investigation forthwith if their investigations showed that either there was no dumping or that there was no indication of injury. After 1954, these two matters were assigned to separate agencies. The Treasury first inquired as to dumping, and when Treasury officials made a determination that indeed dumping had taken place, then the Tariff Commission held its own hearings on injury. The two administrative processes were consecutive, rather than simultaneous.

This system was criticized by exporters on the grounds that given the long periods of time required for the conduct of investigations by the Treasury, and thus the long periods of time during which provisional action was taken (withholding of customs appraisement), they were forced to go through a long and expensive defensive action, perhaps in circumstances in which there might clearly be no real impact of the dumping on domestic producers. In this fashion, exporters built up large contingent liabilities. These liabilities induced them to give price undertakings, that is, to end the proceedings by settling out of court.

In the Kennedy Round, the representatives of certain countries exporting to the United States, particularly the British, but not the Canadians, pressed for some measure of procedural "simultaneity" to be restored. Indeed, this was one of the important issues in those negotiations. Thus Article 5 (b) of the code provided that "upon initiation of an investigation and thereafter, the evidence of both dumping and injury shall be considered simultaneously in the decision on whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied . . . ." Article 5 (c) provided that if there is not "sufficient evidence" of either dumping or of injury to justify proceeding with the inquiry, it must be terminated. Article 5 (a) made it clear that, normally, an investigation is to be initiated upon a complaint being received "supported by evidence both of dumping or of injury resulting therefrom. . . ."

This complicated scheme of obligations and exhortations reflected the consideration that, as the U.S. representatives had asserted, Congress would not amend the U.S. legislation after the Kennedy Round. The provisions regarding simultaneity could not go further than was possible under the U.S. law as it then was. It was held that the Treasury could require a petitioner to show that the dumping did have some impact, that is, "to show cause" why there should be an

investigation. But once a petition had been accepted, the Treasury had no authority to inquire further into injury.

When the Treasury made a preliminary determination that there had been dumping, provisional action could be taken (customs appraisement withheld) and the case then referred to the Tariff Commission for an injury hearing. During the statutory ninety days of the injury inquiry, the Treasury could complete its inquiry as to dumping. If the injury finding were affirmative, the Treasury could then issue an order imposing definitive anti-dumping duties.

In the 1974 act, provision was made for reference to the Tariff Commission in cases where the Treasury had a "substantial doubt" whether an industry in the United States was being injured. The Commission was required to make a determination within thirty days that there was "no reasonable indication of injury"[54] or to state that they could not so determine. The Commission was "loathe to terminate investigations on [this] basis. . . ."[55]

The revised U.S. legislation has made important modifications in the system, which are likely to have a considerable impact on the working of the U.S. anti-dumping system. Much the same provisions have been introduced for countervailing duties. The process begins with the filing of a petition. The requirements are set out in rule 353.36 of the Anti-dumping Rules of the International Trade Administration in the Department of Commerce.[56] In sub-paragraph (13), it is provided that the petition must contain "Information as to the material injury" and rule 353.37 (d) provides that an investigation shall be initiated if the "petition properly alleges the basis on which anti-dumping duties may be imposed. . ." and "contains information reasonably available to the petitioner supporting the allegations. . . ."[57] Only experience will show whether these requirements are as strong as would be a requirement to "show cause" or to make a *prima facie* case. The International Trade Administration has twenty days in which to decide whether or not to accept a petition. Meanwhile, the International Trade Commission, which will have received a copy of the petition directly from the petitioner, will already have begun its "preliminary investigation" into injury. The law allows it forty-five days for the process. Of course, if, by the twentieth day, the International Trade Administration decides not to accept the petition, the ITC is informed, and it terminates the preliminary inquiry about injury.[58]

The purpose of this preliminary investigation is to determine, on an affirmative basis, whether there is "reasonable indication" of injury. If the determination is affirmative, the investigation by the International Trade Administration continues. It has a maximum of an additional 115 days (a total of 160 days from the date a petition is filed) to make a preliminary determination on dumping. For counter-

vail, the time period is shorter: there is a further 40 days, or a total of 85 days from the date a petition is filed.

If the International Trade Administration makes a positive preliminary determination, the ITC starts its "investigation to reach a final determination" of injury. Again there is provision for more "simultaneity" than in the previous system. The International Trade Administration makes its final determination within 75 days after its preliminary, and the ITC then has an additional 45 days to complete its inquiry. There is thus full information on the extent and margin of dumping or of subsidization before the Commission in its final consideration of the injury question. This scheme means that provisional action may be taken for 120 days, not for only 90 days, as the Kennedy Round code provided. The agreement has been revised to allow this (Article 10 (3)).

The introduction of the preliminary inquiry on injury by the ITC on an affirmative basis is one of the most important new elements in the U.S. system. It is perhaps too early to reach an assessment of the impact of this new procedure. Some American commentators appear to have concluded that this preliminary injury test is quite onerous, and that combined with the significant costs involved, in terms of legal fees and management time, the revised procedure will discourage producers from having recourse to these provisions.

In a number of cases dealt with since 1 January 1980, the Commission has found "no reasonable indication." However, in the important steel dumping case, which led to the reintroduction of the "trigger price" system, and which was a case more important in trade policy impact than all others combined, the Commission found "reasonable indication" despite a submission by the U.S. Department of Justice to the contrary. On the one hand, the procedure should lead to prompt disposition of cases for which there is no substantial basis (the sodium hydroxide case is perhaps an example of such a case). On the other hand, affirmative findings of "reasonable indication" of injury will set the stage for exporters to accept that they must come to terms with the U.S. producers by giving undertakings.

The contrast with the current Canadian proposals is noteworthy. There is no provision in the present or proposed Canadian system, except for the much more limited provision allowing a complainant (who has complained in writing) to the deputy minister (of national revenue) to refer a case to the Anti-Dumping Tribunal for advice on injury. The complainant has the right to seek such advice in the situation in which the deputy minister has decided not to proceed with an investigation because he is not of the "opinion" that there is "evidence of injury." Compared to the new U.S. system for preliminary injury determinations, this is very limited indeed. One might well ask why the importer (or exporter) concerned should not have an equal right to seek the preliminary opinion of the Tribunal.

The Trigger Price System and the Question of "Basic Price"

There is reference above, in the comments on the evolution of "contingency" protection, that this new direction of policy shades off into administered trade and market-sharing concepts. A prime example of administered trade, that is, administered *quantities*, is the regime of import quotas and export restraint arrangements for textile and clothing products under the aegis of the "Multi-Fibre Arrangement" (MFA). An important example of administered import *prices* is the Trigger Price Mechanism (TPM), for steel products, referred to at several points in this study, which was reinstituted for a second time following the launching of an anti-dumping proceeding against steel from the EEC.[59]

The essential element of the system was a schedule of import prices, originally established on the basis of delivered prices for Japanese steel. Japanese steel was chosen as the base for the system because Japan was considered the most competitive producer. Any import at less than the scheduled "trigger price" is, by this logic, assumed to be dumped. If there were such an import, an anti-dumping procedure could be threatened. That was the TPM sanction. This system, simple enough in principle, was very difficult to administer. The task of scrutinizing imports was very great; it was said that in the first period of the TPM 60 per cent of imported steel was being sold at less than trigger prices. Moreover, there was continual pressure to raise the scheduled prices so that the U.S. steel producers could raise theirs. Moreover, there was pressure from steel users in the United States to cut the TPM prices or to restrain imports that competed with their products, which were becoming uncompetitive because of high U.S. steel prices. Moreover, it may not have been realized by the various parties concerned that Canadian steel producers could deliver steel in the United States Great Lakes area at less than Japanese delivered prices, but without dumping. We need not concern ourselves here with the details of the history of the TPM: the filing of an anti-dumping petition by U.S. Steel Corp. and the withdrawal of the first TPM, the preliminary determination of "a reasonable indication" of injury, and the re-institution of the TPM, and then its collapse. The point of importance is that here was a major sector of trade made subject to a regime of minimum import prices; this regime was an ingenious derivative of the anti-dumping system. In fact, the TPM has been perhaps the most important manifestation or realization of the U.S. anti-dumping system. It is important, too, that the TPM was urged on the United States by the EEC, which had much preferred such an arrangement to a series of anti-dumping findings, such as are now in prospect.

The comparison with what is proposed for Canada in the *Discussion Paper* is important. The *Discussion Paper* proposes that it should be "for consideration" whether Canada should have what is called in the Anti-dumping Agreement a "Basic Price System." This is envisaged as being a crisis mechanism. Under the proposed system, rather than proceeding by the regular anti-dumping route, import prices would be surveyed for the product at issue and a schedule of prices established, based on the lowest non-dumped prices, regardless of source. Imports below such basic prices would be subject to anti-dumping duties, not merely the threat of an anti-dumping proceeding being launched.

There are a number of safeguards proposed in the *Discussion Paper*, but it is not necessary to examine them here. The main point is that the proposed Canadian basic price system is far more draconian than is the U.S. TPM. In the TPM, the sanction against selling at less than the scheduled minimum import price is an anti-dumping proceeding; in the proposed Canadian system, it is the levy of a duty. Canadian steel producers who have exported to the United States under the TPM will understand that if the United States had had a basic price system rather than the TPM, Canadian exports would have been seriously affected.

The view of the United States and of the EEC is that the code does not permit a signatory to have a basic price system as an option, in addition to its ordinary anti-dumping system. The basic price system was covered in the Kennedy Round code, and then in the Tokyo Round code, because at least one GATT country had such an anti-dumping system. The "legislative history" of the code does not suggest that it was envisaged that a signatory of the code could have such a facility as an option or alternative.

The question that will have to be settled in Canada is whether it needs this particular crisis mechanism. If the answer is yes, and it is legislated, Canada will have gone an important step farther in instituting a regime of "contingency" protection than has the United States. Despite its experience with the TPM, or perhaps because of it, the United States did not legislate the basic price concept into its system. This may be an indication that at the policy level U.S. officials have seen the obvious — that is, that arrangements such as the TPM, designed to deal with crises, should be advanced under the rules of Article XIX of the GATT. They are essentially safeguard mechanisms, not anti-dumping arrangements. The same argument goes for the sort of crisis situation in which, as it is envisaged, Canada could deploy its basic price mechanism.[60]

Notes

[1] This section draws on R. de C. Grey, *The Development of the Canadian Anti-dumping System* (Montreal: Private Planning Association, 1973).

[2] Jacob Viner, *Dumping: A Problem in International Trade* (Chicago: University of Chicago Press, 1923), p. 23: "But for purposes of economic analysis probably the most serviceable bases for classification are according to the motives or the objectives of the dumper and according to the degree of continuity of the dumping."

[3] At the time of writing this study, there were no escape clause actions before the ITC.

[4] Stanley Metzger, *Lowering Nontariff Barriers* (Washington, D.C.: The Brookings Institution, 1974), p. 63.

[5] U.S., Congress, Senate. *Congressional Record* (23 July 1979), S10310, Statement of Senator Roth.

[6] Peter D. Ehrenhaft, "What the Anti-dumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean in U.S. Trade Policy," *Law and Policy in International Business* 11 (1979), pp. 1377–78.

[7] Section 34 of the Combines Investigation Act.

[8] For a review to 1974 of the United States countervailing duty provisions, see Metzger, *op. cit.*, pp. 101–25.

[9] Section 331, amending section 303 of the Tariff Act of 1930.

[10] For a different judgement, see Gerard Curzon and Victoria Curzon-Price, "The Undermining of the World Trade Order," *ORDO* Band 30 (Stuttgart: Fischer-Verlag), p. 398 "... one of the EEC's principal negotiating objectives was to persuade the United States to adopt an "injury criteria" before applying countervailing duties, in line with GATT's Article VI. This is part of the final Tokyo Round package, and if the U.S. Congress accepts ... the world trade system will lose the principal disciplinary measures which dissuades governments from over-subsidizing infant or geriatric industries."

[11] U.S., Congress, Senate, *Congressional Record* (23 July 1979), S10296–S10341; see especially remarks of Senator Heinz, S10306–S10315, and Senator Bayh, S10336.

[12] *Decision of the United States Court of Customs and Patent Appeals* CAD 1017, p. 17.

[13] An example is the case involving steel-belted radial tires exported from Canada.

[14] Metzger, *op. cit.*, p. 105: "One of the most striking aspects of countervailing duty administration in the United States is the almost total lack of procedural safeguards in official proceedings. Neither statute nor regulations make any provision for hearings and the usual ancillary procedures according substantial elements of procedural due process to parties or countries affected by a countervailing duty imposition. The lack of procedural safeguards is peculiarly disturbing in view of the very great discretion delegated to the secretary of the treasury and, through him, to the Bureau of Customs."

[15] 38 *Federal Register*, No. 4 (8 January 1973), 1018, reproduced in John H. Jackson, *Legal Problems of International Economic Relations* (St. Paul: West Publishing, 1977), p. 787.

[16] "United States: Supreme Court Decision in *Zenith Radio Corp.* v. *United States*," *International Legal Materials* 17 (July 1978): 923–48.

[17] Section 121 (a) (5) of the Trade Act of 1974.

[18] *Optic Liquid Level Sensing Systems from Canada*, 44 *Federal Register*, No. 5 (8 January 1979), 1728–30.

[19] The reiteration that this was indeed the scope of Article VI was the purpose of footnote 2 to Article 1, Part 1 of the Agreement.

[20] Section 271(5) of the Tariff Act of 1930, as set out in section 101 of the Trade Agreements Act of 1979.

[21] 46 *Federal Register*, No. 111 (10 June 1981), 30676–77 for text of most recent review of the countervailing duty order concerning Michelin. The following comment relates to "offsets": "Michelin requested that the Department take into consideration offsets due to costs incurred by location in an economically disadvantaged area. Under the T.A.A. offsets of this type can no longer be considered by the Department for entries made after January 1, 1980. However, since entries covered by this review were made prior to the enactment of the T.A.A. the Department will allow such offsets if supported by sufficient evidence. Michelin did not provide verified evidence for these offsets; thus no offsets have been granted."

[22] Marks, *op. cit.*, calls this one of the more significant of the substantive changes in the new legislation. See also the comments by Peter Buck Feller, "Preface. Observations on the New Countervailing Duty Law," *Law and Policy in International Business* 11 (1979), p. 1444.

[23] Senate Committee Report, p. 94; Trade Agreements Act, p. 177.

[24] Section 771 (5) of the Tariff Act (title 1 of the Trade Agreements Act); Senate Committee Report, p. 84.

[25] For a useful short account of the evolution of the injury concept in U.S. law prior to 1975, see Metzger, *op. cit.*, pp. 81–82.

[26] U.S., Congress, Senate, Finance Committee, *International Antidumping Code, Hearings*, 90th Cong., 2d sess., 27 June 1968.

[27] Section 771 (7) (B) and (C) of the Tariff Act, as set out in title 1 of the Trade Agreements Act.

[28] Letter from Vice Chairman Haferkamp to Ambassador Robert Strauss, 17 May 1979. The full text of the letter is as follows:

DELEGATION OF THE COMMISSION OF THE EUROPEAN COMMUNITIES

May 17, 1979

Dear Bob,

We discussed on the telephone on May 15 our problems of material injury and the issues raised in my message to you of 25 April! We have had some intensive consultations within the Community on these issues over the last few days and as a result I think it would be useful if I were in this message to do two things. First to summarize the main points which we think it essential to get right at the informal conference next week, and secondly briefly to re-state, given the crucial importance of next week's events, the points which we have put to you on this basic issue.

You know the importance which the Council attaches to the enabling legislation in the United States being a faithful and accurate reflection of the various agreements or codes initialled in Geneva on April 12. And you will recall the Council's decision that the Community would not implement all its concessions until such time as all the developed countries have completed their necessary parliamentary procedures and were able to implement their concessions which would mean the enabling legislation referred to above was satisfactory and that the measures to implement the conclusions of the MTN's had been taken in practice and to good effect. And you are familiar with our concern that any enabling legislation on your side which watered down the results of the negotiations would gravely prejudice the ratification of these negotiations by the Community. This of course is not just a bilateral issue but a question vital to the success of the whole negotiation.

Perhaps I could then summarize the main points which we think essential to get right in the legislation. This list which is by no means exhaustive is as follows:

Countervailing and Dumping Codes

The problem on material injury is familiar to you. From our point of view the term material injury is a sufficient definition of injury, particularly bearing in mind that the

official French version of the GATT text — préjudice important — has the same value as the English text. In colloquial terms, material to us means important, weighty, substantial. Negative definitions such as have recently been under consideration, clearly would not be a true reflection of the GATT rules.

We want to see the code definition maintained for like products (and are encouraged at signs that the reference to directly competitive products may now be dropped).

The evidence necessary before procedures can be open must, in accordance with the code, be sufficient evidence and not merely the information reasonably available to the complaint.

The definition of net subsidy should not be such as to reduce the Treasury's present discretion regarding offsetting methods of calculation.

U.S. statutory time limits for the different stages of internal procedures must be sufficient to allow for fair and equitable investigation and to enable internationally agreed consultation etc. procedure to be followed. Indeed, any completely inflexible time limit could hinder fulfillment of the objectives of these consultation procedures. At least in complicated cases provision should be made to extend time limits. We look forward to a solution being found to the problem of Section 337, whereby dumping and subsidy matters are solely dealt with under the specific legislation related to them, and excluded from the scope of Section 337.

Disclosure of confidential information under protective orders may cause real problems. If procedures are worked out regarding disclosure they should apply equally to ITC as to Treasury investigations.

On dumping, in cases where constructed value is used, a more equitable and realistic method of calculating profit is needed than the arbitrary 8 0/0 rule.

Other Codes and Agreements

We are trying to check these carefully in the next few days and if it turns out that there are difficulties, I will of course let you know.

One further point is that, as I explained in my message of 25 April, implementing legislation should either cite the MTN agreements or reproduce their essential provisions. Moreover, we think it important that U.S. courts (like those in the Community) should be in a position to refer to the codes on points of interpretation. We have suggested that among the implementing act's statement of purposes should be included a reference to the fact that the legislation is intended to enable the United States to fulfill the obligations it has assumed under the MTN agreements. Additionally, in the Administration's report to the Congress on its intentions regarding implementation of the act the intention to respect the letter and spirit of the code should be clearly stated.

Let us remain in close touch on this over the next few days. Best wishes for a full success at the conference.

Regards,

Willi

The Honourable
Robert S. Strauss
Special Trade Representative
Washington, D.C. 20506

[29] Text of letter, 31 July 1980, provided by Matthew Marks.

[30] 46 *Federal Register*, No. 10 (15 January 1981), 3581.

[31] See, for example, Metzger, *Compliance with International Obligations: Some Recent United States and Canada Injury Determinations under the International Anti-dumping Code*, Occasional Paper 31 (Ottawa: Carleton University, Norman Paterson School of International Affairs, 1976), and "The Anti-dumping System and the Trade Agreements Act of 1979," a paper prepared for the Canada-United States Law Institute, University of Western Ontario Conference, London, Ontario, June 1980.

[32] The Tariff Commission had, at times, appeared to understand injury as a separable concept, and the implications of so doing. For example, "There is also a question of

whether and to what extent the condition of the alleged victim should be taken into account in appraising injury. Is an extremely strong person less injured or his rights less violated by a given loss than a weak person? Men are likely to become more incensed at an attack upon one who is weak than one who is strong and may even be tempted to forgive the first attack on the strong because the immediacy of injury is less apparent. On the other hand, condoning continued attacks on the strong is likely to lead to eventual material injury even to the strong." U.S. Tariff Commission, *Steel Reinforcing Bars from Canada, Determination of Likelihood of Injury*, 29 *Federal Register* (27 March 1964), 3841.

[33] See the remarks of Senator Heinz, U.S., Congress, Senate, *Congressional Record* (23 July 1979), S10311. Note also the text by Frederick C. Ikenson printed in the *Record* at S10309–S10311.

[34] See Grey, *op. cit.*, pp. 44–46, for comments on causality; these comments were circulated in the negotiating group in Geneva during the Tokyo Round.

[35] See J.G. Wasserman, "Injury from Dumping: The Problem of the Regional Industry," *Georgia Journal of International and Comparative Law* 9 (1970): 469–94.

[36] See John H. Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969), p. 419, footnote 50.

[37] See, for example, *Cast Iron Soil Pipe. . .*, 32 *Federal Register* (1967), 12925 (Determination of Injury).

[38] Article 6(9) of the Subsidies/Countervail Agreement.

[39] For a discussion of the "preliminary" inquiry into injury, see below.

[40] International Trade Commission, *Fish . . . From Canada*, Investigation 701–TA–40 (Final).

[41] International Trade Commission, Publication 1040 (February 1980), Investigation Nos. 731–TA–8, 9, 10, and 11 (Preliminary).

[42] *Op. cit.* p. 10.

[43] *Op. cit.* p. 7.

[44] International Trade Commission, Publication 1047 (March 1980), Investigation No. 731–TA–3 (Final), *Sugars and Syrups from Canada*, p. 4.

[45] The decision of the Court of International Trade is *Atlantic Sugar, Ltd., et al.* v. *United States* (C.I.T. No. 80–5–00754); the ITC redetermination is International Trade Commission, Publication 1189 (October 1981). The quotation is from pp. 6–7.

[46] 431–TA–26 (Final); 45 *Federal Register*, No. 158 (13 August 1980), 53928.

[47] 731–TA–29 (Preliminary); 45 *Federal Register*, No. 202 (16 October 1980).

[48] Section 733 (e) (1) (A) (B) of the Tariff Act, at page 165 of the Trade Agreements Act, and in section 735 (a) (3) and (b) (4) of the Tariff Act, pages 170–71 of the Trade Agreements Act.

[49] Canada, Anti-dumping Tribunal, *Stainless Steel . . . Pipe Fittings . . . from the Republic of South Africa*, 3 October 1979.

[50] Ivo Van Bael, "Ten Years of EEC Anti-dumping Enforcement," *Journal of World Trade Law* 13 (September/October 1979): 395–408.

[51] For countervail: section 704 of the Tariff Act, as amended by the Trade Agreements Act; for anti-dumping: section 737 of the Tariff Act, as amended.

[52] Shelley A. Lorenzen, "Technical Analysis of the Antidumping Agreement and the Trade Agreements Act," *Law and Policy in International Business* 11(1979), p. 1429.

[53] As made clear above, no attempt is being made here to examine all the very complex procedures. However, it has seemed to this writer that it is important to consider in

some detail the introduction of the formal preliminary inquiry by the ITC. This innovation is a key component in the anti-dumping and countervailing duties systems of the United States. A useful statement regarding procedures is *Summary of Statutory Provisions Related to Import Relief*, International Trade Commission, Publication 1057 (April 1980).

[54] Trade Act, section 321 (c) (2).

[55] Ehrenhaft, *op. cit.*, p. 1374.

[56] 45 *Federal Register*, No. 26 (6 February 1980), 8198.

[57] The parallel rules for a countervailing duty petition are 355.26 and 27 in the 45 *Federal Register*, No. 15 (22 January 1980), 4942.

[58] The procedural rules for the ITC are in the 44 *Federal Register* (26 December 1979).

[59] The original TPM had also been instituted as a substitute for anti-dumping action. The TPM has now been abandoned, despite the objections of the EEC, because U.S. producers have decided it is not being effectively administered and that formal anti-dumping action (or countervailing action) is required.

[60] Of course, if Canada proceeds to enact the basic price provision, and it is agreed in Geneva to be consistent with the Anti-dumping Agreement, then there will be great pressure for the United States to do so as well.

The position was summarized in the statement by the Honourable Pierre Bussières (Minister of State/Finance) to the Subcommittee of the House of Commons Standing Committee on Finance, Trade and Economic Affairs (13 April 1981). He said, in part:

> You will recall that in the Discussion Paper it is also proposed that we should consider providing in the anti-dumping legislation for use in exceptional circumstances of a so-called basic price system. This is frankly a matter on which we are of two minds. While such a system is provided for in the GATT Anti-dumping Code, its use would be controversial in view of its protectionist features. While no GATT member has a basic price system in effect now, special anti-dumping schemes which have essentially the same economic effect as basic price systems have been adopted by the U.S. and EC for steel products. In response, Canada instituted a system of benchmark prices.
>
> When the import policy proposals were being drawn up, it was decided to include a basic price proposal *since it was permitted by the GATT*, and it was conceivable that under certain circumstances Canada might wish to have recourse to some such mechanism. Of all the proposals in the Discussion Paper, this is the one that has perhaps received the most attention by our trading partners. They have indicated they consider the proposal to be overly protectionist and unnecessary. Quite apart from our import interests, we must also be mindful of the effect that proliferation of basic price systems or schemes similar to basic prices might have on Canada's export interests. If Canada were to seek enabling legislation to implement such a mechanism, certain of our trading partners might come under pressure to also acquire such powers.
>
> Basic price systems and similar schemes have been the subject of recent discussions in the GATT. The focus of these discussions has been whether an understanding should be reached which would limit or eliminate altogether the use of all such measures. These discussions are continuing but have not produced any resolution to the issue as of yet. It would be my view that the Sub-Committee should continue to treat the proposal concerning basic prices as still being on the table, although it should be aware that careful consideration will need to be given as to whether it is advisable to implement such a proposal.

The Subcommittee, after careful study, recommended in its final report of July 1982 against Canada adopting the Basic Price System.

Action Against Other "Unfair" Trade Practices

5

To complete the description of the range of measures that can be activated by U.S. producers against "unfair" trade practices in import competition, one should also consider section 337 of the Tariff Act and section 301 of the Trade Act.

The principal category of cases that have arisen under section 337, despite its revision from time to time, are cases alleging infringement of U.S. patents by imports. In Canada, these are dealt with by private suits under the Patent Act, resulting, when the action is successful, in court orders providing for remedies. Section 337 also provides for remedies for infringement of copyright, trademark, or the misappropriation of trade secrets or technical know-how by or with regard to imports.[1] To what extent section 337, as it has been revised by the Trade Agreements Act, permits actions based on allegations of "unfair" trade practices other than patent infringement and similar issues remains to be seen. Two recent cases, involving steel jacks and surveying devices from Canada, are relevant; the disposition of these two cases certainly raises the issue of whether or not Canada should also have a similar residual or "catch-all" provision in its import control legislation.

The origin of the present section 337 is the Trade Act of 1974. In that act, revisions were made to provide a broad prohibition on "unfair methods of competition and unfair acts in the importation of articles into the United States . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States . . . or to restrain or monopolize trade and commerce in the United States." Equally, if not more important, the procedure for section 337 inquiries, and the scope for independent Commission action, was significantly expanded. A U.S. trade lawyer has summarized the complex procedural changes resulting from the Trade Act as follows:

> Then came the complete rewriting of Section 337 in the Trade Act of 1974 . . . placing Commission Section 337 proceedings under the Administrative Procedure Act and authorizing the Commission to itself issue the remedial orders thereunder instead of merely recommending that the President take such action, as had been the

case previously. The Trade Act of 1974 also amended the Commission's organic act by authorizing it to be represented in judicial proceedings by its own attorneys rather than those of the Attorney-General, a far-reaching amendment which, with some others, has finally freed the Commission from the Executive Branch. The Trade Act of 1974 became effective in 1975, and by 1976, the Commission was conducting its Section 337 proceedings under new rules as quasi-adversary proceedings under the Administrative Procedure Act. The new rules provided for discovery and for enforcement of discovery orders including sanctions against failure to comply with such orders.[2]

These procedural changes gave very much greater scope for U.S. producers to invoke section 337. Patent cases remained the staple fare, but it was also possible to use section 337 as an alternative or supplementary method of proceeding against dumping, in situations in which perhaps the anti-dumping provisions were felt not to be adequate. On the face of it, this was inconsistent with Article 2 of the Anti-dumping Code.

It was provided that if the practice being complained of was dumping or the importation of subsidized goods, the Commission was to "promptly notify the Secretary of the Treasury." However, this provision did not preclude the Commission continuing to consider such a case. Thus, the scope for U.S. producers to attack importers under several provisions of law was significantly increased. This came to be called "multiple harassment."

To take an important example,[3] Matthew Marks has drawn attention to the extraordinary multiplicity of actions mounted by the U.S. television producers against imports of Japanese television sets. There was a finding of dumping by the Treasury and, in due course, an injury determination by the Commission, and then a prolonged and as yet uncompleted assessment of the anti-dumping duties due; a countervailing duty investigation that led to a negative determination, which was reviewed in the courts (the Zenith case); an anti-trust action; an escape clause action; and an investigation by the International Trade Commission under section 337. All this became a subject of debate during the Tokyo Round discussions. At one point in time it seemed quite possible that "multiple harassment" could become a major separate issue in the negotiations. On the face of it, the GATT did not seem to preclude certain categories of "multiple harassment" so long as the separate actions were each consistent with the GATT, or related to matters on which the GATT is silent (e.g., patents).

The one feature of section 337 that did clearly raise a question of consistency with the GATT was the possibility of there being a proceeding under this section against dumped imports. The thrust of the Kennedy Round code was that the only remedy for dumping was an

anti-dumping duty applied under the provisions of that agreement. There was no provision for a prohibition on imports; such a new prohibition on imports would be inconsistent with the GATT. A "cease and desist" order under section 337, if it related to dumped goods, would be inconsistent with the code.

However, the representatives of other countries thought that the issue had been resolved when the President disapproved a determination of the Commission in a case brought under section 337 regarding the alleged dumping of "certain welded stainless steel pipe and tube" on the stated grounds, *inter alia*, that the specific remedy for injurious dumping was to be found in the anti-dumping provisions.[4] Under subsection (g) of section 337, the President had such authority to set aside a proposal by the ITC. This disapproval of a determination of the ITC by the President was much resented by certain members of that Commission, and certainly their views became known to Congress.

For greater certainty, it was agreed that the revised Anti-dumping Code should include a provision making clear that action against dumping could be taken only in accordance with that agreement. This is Article 16.1; the footnote to that paragraph is intended to make clear that action can be taken, of course, under Article XIX, or under the countervailing duty provisions, if the reason for dumping is subsidization.

In the Trade Agreements Act, section 1105 amended section 337 of the Tariff Act by providing that if the issue before the Commission under section 337 is "solely" related to matters within the scope of the anti-dumping and countervailing duties provisions, the issue is to be dealt with under those provisions. However, if the issue is based, in part, on "acts and effects" that are apart from these two other provisions, the Commission can proceed under section 337. Marks takes the view that a domestic producer, proceeding under the anti-dumping or countervailing duties provisions, can also proceed under section 337 by alleging "a conspiracy or intent to destroy competition." He comments: "There is good reason to believe that the failure of the Trade Agreements Act to address adequately the Section 337 issue was deliberate."[5]

In the event that a United States producer secures relief against dumping or subsidization under section 337, the consistency of such an action with the new agreements could be raised in the appropriate Committee of Signatories. Of course, the existence of section 337 does not itself create a breach of the obligations of the United States under the GATT or the two agreements; it is only an *action* by the United States that would raise such an issue.

It is important to note that section 337 contains criteria not found in the Anti-dumping Code or in the U.S. anti-dumping provisions. First, the industry seeking protection, claiming that it is being injured by

unfair import competition, must show that it is "effectively and economically operated." Moreover, the "public interest" provisions of subsection (d) of section 337 require that, in considering an exclusion order, the ITC must consider the impact of such an order on the public health and welfare, on competitive conditions in the U.S. economy, on U.S. producers of competitive products, and on the interests of U.S. consumers. In 1974, the Senate Committee made clear that exclusion orders should not be issued "where there is any evidence of price gouging or monopolistic practices in the domestic industry."[6]

One might think that these requirements in section 337 would require, in effect, a tougher test of injury than required under the anti-dumping provisions. But the section 337 language is significantly different from the anti-dumping language. Section 337 speaks of "a tendency . . . to substantially injure an industry. . . ." On balance, it would be prudent to be guided by the observation expressed by William Ince, in a seminar in Toronto, that "the Commission has never based a negative determination on a finding that the domestic industry was not being efficiently and economically operated."[7]

A case concerning Canadian exports[8] (*Certain Surveying Devices*) and involving allegations of patent infringement that was the basis for an order that the goods in question be excluded from the United States, unless they were imported with the permission of the patent holder, raised the question of the meaningfulness of the section 337 injury requirement. (The complaint also alleged other "unfair" trade practices: trademark infringement, false designation of origin and country of origin, use of "know-how," "passing off," etc. These claims were not supported by the Commission.) Although there was evidence of sales lost to the imports in question, domestic sales, production, and returns had all increased during the period of competition from imports. The Canadian authorities expressed their concern to the U.S. authorities that this case could set an "undersirable precedent in future injury determinations."

The administration was not unsympathetic but was not prepared to recommend disapproval by the President. The special trade representative, then Governor Askew, wrote to the chairman of the ITC. His letter reads in part:

> The President has not disapproved the Commission's order, but he is concerned about the possible policy implications which may be raised by use of this case as precedent. He foresees that our international trading relationships could be adversely affected if the Commission finds injury cases where, as in this case, the percentage of annual sales increase is declining, but where there is minimal evidence of lost sales and the domestic producer is producing at 100% of capacity. In the event that occurs, U.S. foreign and economic

policy interests will likely cause him to disapprove any remedy ordered.

Whether such a position would be endorsed by the present trade representative, William Brock, and by President Reagan, is not clear. Possibly as a result of this implied censure, the ITC has recently examined all the various facets of the injury requirement of section 337 in the case *Certain Headboxes and Papermaking Machinery*. . . .[9] This detailed determination, including the dissenting opinion of Commissioner Stern, sets out a variety of considerations regarding the concepts of "effect or tendency" (to substantially injure an industry); it notes the public interest requirements (of subsection (d)), it examines the differences between an exclusion order and a cease-and-desist order, and the bond to be required covering imports while the proposed order is before the President. There is an extensive commentary on "injury" under section 337.

We should return briefly to patent infringement, the issue that has been, statistically, the focus of section 337. The scope of section 337 in regard to patents is extended by section 337 (a) to an imported product made by a process covered by a U.S. process patent, although, within the United States, a process patent cannot be infringed by the product. An important case involving this aspect of section 337 is that involving *Certain Multicellular Film*.[10] The issues involved in this particular case are complex. Suffice it to say that it establishes that section 337 (a) provides a basis for action against imports by the owners of U.S. process patents that they do not have, in comparable circumstances, in regard to domestic competition.[11]

The more important question, perhaps, is raised by the so-called Wallbank case. In this case, a Canadian exporter of automotive spring assemblies and components was complained against under section 337; it was argued that a U.S. patent was being infringed. The Commission found in favour of the complainant and recommended an exclusion order.[12] The decision raised the key issue of why patent infringement by imports should be dealt with in this special court (the ITC) rather than in the same domestic courts as would deal with patent infringement by a domestic producer (as would be the case in Canada). Further, there was the related, perhaps only moral, question of whether it is appropriate for the U.S. domestic producer to take action only against the foreign competitor and not against patent infringement believed to be occurring at the same time by domestic producers. The Canadian authorities have recently asked a GATT panel to consider these questions.

There are also some interesting, and important, cases of the Commission acting under section 337 to deal with import competition other than in relation to alleged patent infringement. For example, the Commission launched an investigation (using the investigative

authority of section 603 of the Trade Act) into the question of whether imports from Japan of calcium pantothenate were the subject of "a conspiracy to restrain trade and commerce in the United States" or to monopolize the U.S. market.[13] Among the specific issues to be investigated is whether there are "any attempts by certain Japanese manufacturers or importers to absorb the amount of any anti-dumping duties imposed on these imported products." (This, despite the fact that, under the anti-dumping provisions, the rules regarding the calculation of the sale price for dumped goods do make specific provision for the situation in which the exporter pays an anti-dumping duty on behalf of the importer. The rule there provides that that reimbursement becomes an additional margin of dumping, and thus that an additional anti-dumping duty is to be levied.)

This investigation by the ITC was presumably launched because of a complaint by a U.S. producer interest. The complaint was presumably related to the effectiveness of the anti-dumping finding in place regarding this product.

To take another example, the Commission inquired into the question of whether steel jacks imported from Canada were the subject of a conspiracy to fix prices at "unfairly low levels for the purpose of restraining or monopolizing trade and commerce in the United States." Like the case involving calcium pantothenate imports from Japan, this case was launched by the Commission under the authority given it by section 603 of the Trade Act to carry out a preliminary investigation into matters that may fall within its jurisdiction.

In the notice of preliminary investigation, it is stated that the Commission staff was directed to gather certain information "relative to questions raised by a complaint" filed in March 1980 by a U.S. producer (identified in the notice).[14] The information sought concerned prices charged by the Canadian manufacturer of steel jacks to its distributors in the United States; "all other relevant cost of these importer/distributors"; prices to be charged to U.S. customers of these U.S. firms; "the nature of any written, oral agreements, if any, "between the Canadian producers and its United States importer/distributors," or "any agreements between such importer/ distributors relating to pricing levels, advertising, or labelling of the country of origin of such jacks"; and, finally, "the costs of production for these steel jacks by the Canadian manufacturer." A request for the last category of information may appear to raise a question of whether the ITC is asserting jurisdiction outside the United States. However, it is the case that comparable information is sought by U.S. and Canadian customs officials in valuation situations involving constructed value.

In July 1980, notice was given that the ITC had "voted to continue the investigation to permit the Commission staff to negotiate a settlement with respect to possible violations of Section 337. . . ."[15] A

consent order covering price labelling and pricing requirements was published and, in due course, issued.[16] It is understood that the Canadian authorities did not raise objections to the terms of this order.

It is not clear to this writer why an allegation of the sort of price fixing and marketing conspiracy could not be acted against under the anti-trust provisions, either by an action by the U.S. government, or by a private action. The question also arises whether, under Canadian law, there is an adequate or comparable measure of protection for Canadian producers against this sort of conspiracy to establish import prices and to make other marketing decisions regarding imports, or whether some additional enactment is necessary. The *Discussion Paper* is silent on this issue.

Yet another example of section 337 import regulation concerns country-of-origin marking. A committee representing domestic producers of wire rope argued that U.S. consumers of wire rope preferred the domestic product but that, deliberately or accidentally, the marking of imported wire rope was being removed or the information as to origin otherwise not passed on to the consumer. This was alleged to be an "unfair" practice. The Commission had an "informal" inquiry carried out and issued a detailed "Proposed Rule" regarding the marking of imported wire rope. It was contemplated that a violation of this rule would be actionable under section 337 and that the Commission could either prohibit the imports in question or issue a "cease-and-desist" order.[17] This activity of the ITC raised an issue as to the propriety of the Commission engaging in substantive "rule making," and for this and other reasons the ITC withdrew its proposal.[18]

These various examples do make clear that, as Marks has observed, there is scope under section 337 to deal with a good deal more than patent and trademark infringement.[19]

Section 301 of the Trade Act is, in a sense, parallel to section 337, in that it addresses unfair trade practices but of other *governments*, including alleged breaches of their obligations to the United States.[20] In terms of any precise impact on Canada, this section has not yet been of great importance. Canada has not often been perceived in the United States as breaching its obligations or indulging in unfair practices.[21] However, it was under this provision that U.S. broadcasters petitioned for some remedy to offset the provision in Canadian income tax law that denies deduction as an expense of any expenditure on advertising on a foreign television station directed at the Canadian market. (This is the so called "Border-Broadcasting" issue.) Section 301 extends to issues involving U.S. export of services, as well as goods; broadcasting and broadcast advertising are classed as services. In this case, the broadcasters filed a petition, hearings were held, chaired by a representative of the special trade representative, and, in

due course, a number of proposals were formulated designed to bring pressure on Canada to change its practice. These proposals were then the subject of further hearings. In parallel, U.S. broadcasters organized themselves to oppose U.S. congressional ratification of the new tax treaty between Canada and the United States, because that treaty proposed to amend a 1967 rule that precluded tax deductions for Americans attending business conventions in Canada. For a considerable period, this had been the proposed trade-off for Canada amending its tax rule regarding broadcasting expenses. However, this bargaining counter had been thrown into the negotiations of the new tax treaty.[22] Finally, it was concluded that the proper remedy for this "unfair" practice was the enactment by the United States of matching or "mirror" provisions.

Another important case concerning a Canadian measure was the retaliation by the United States against Canadian restrictions on imports of U.S. cattle. (This U.S. action was taken under section 252 (a) of the Trade Expansion Act of 1962, one of the earlier provisions now subsumed in Section 301 of the Trade Act of 1974, as amended by title IX of the Trade Agreements Act.)[23]

A recent case under this section involves the Bombardier contract to deliver 825 subway cars to the New York Metropolitan Transportation Authority (MTA). At the heart of this issue is the $563 (U.S.) million financing at 9.7 per cent interest provided by the Canadian Export Development Corporation. In addition to legal actions taken by the U.S. competitor for the contract,[24] the AFL-CI0 has lodged a complaint under section 301. The Office of the Special Trade Representative has formally agreed to review the petition, and although the union organization is no longer involved, an investigation is now under way on the administration's initiative.

As for Canada, the Customs Tariff has contained authority for retaliatory action, at least since the 1930s. Section 8 provides authority for a thirty-three and a third per cent additional tariff on goods imported from any country that discriminates against Canadian goods and authorizes similar retaliatory action when there is discrimination against Canadian shipping. "Proposal 10" of the proposals in the *Discussion Paper* suggests, in effect, that these be modernized and more closely tied to the existing GATT articles. For example, the proposal refers to the case in which "tariff or other trade concessions previously extended to Canada are impaired." The concept of concessions being "impaired" is from Article XXIII of the GATT. Further, it is suggested that there be authority given to impose counter-measures when Canada is so authorized by the Committee of Signatories under the Subsidies/Countervailing Agreement. In the draft act, these proposals are incorporated in a revision of section 7 of the Customs Tariff. It is difficult to refute the argument that the authority for retaliatory action by Canada should be modernized.

There is one major difference between the U.S. legislative scheme and the emerging Canadian system. In the U.S. system, there is detailed provision for the system to be activated by a private party. As amended by the Trade Agreements Act, the scope for officials to not act, to fail to respond to a demand that some action be taken to enforce a U.S. trade agreement right, has been quite sharply narrowed.[25] An "interested person" can file a petition with the trade representative, who must determine within forty-five days whether or not to initiate an investigation. If he decides negatively, the decision must be published in the *Federal Register* with a summary of reasons for the decision. If the trade representative decides to investigate, he must publish the text of the petition in the *Federal Register* and provide for the presentation of views, including a public hearing, if such hearing is requested by the petitioner. In addition, section 303 provides that when the petition is accepted, the trade representative must seek consultation with the foreign government concerned and, if they do not yield a satisfactory result, activate the dispute settlement provisions of the relevant GATT agreement. Section 304 provides a timetable and procedures for making recommendations to the President.

It has been said, informally, that the U.S. provision gives U.S. citizens a right to activate the dispute settlement clauses of such arrangements as the Subsidies/ Countervailing Agreement and that the new U.S. system gives private citizens access to intergovernmental procedures that, customarily, have been reserved to governments. In U.S. terms, these additional procedures enacted in 1979 merely reflect Congress' concern that the administration has not been sufficiently zealous in protecting U.S. rights.

The Canadian arrangements, on the other hand, are concerned only with one issue: that is, to secure for the government delegated authority from Parliament to act by order in council. There is no formal provision for private parties to activate procedures relating the exercise of these discretionary powers.

Notes

[1] See International Trade Commission, Supplementary Procedure — Investigations of Unfair Trade Practices in Import Trade, 2 April 1980.

[2] Wayne W. Herrington, "U.S. International Trade Commission: Imported Articles Made by Patented Processes," *Journal of World Trade Law* 14 (November/December 1980): 549–55.

[3] Matthew J. Marks, "Recent Charges in American Law on Regulatory Trade Measures," *The World Economy* 2 (February 1980): 427–40.

[4] *Presidential Determination* of 22 April 1978, 43 *Federal Register* (26 April 1978) (re Investigation No. 337–TA–29).

[5] Marks, *op. cit.*, p. 439.

[6] U.S., Congress, Senate, Finance Committee, *Trade Reform Act of 1974*, 93rd Cong., 2d sess., 1974, S. Report 1298.

[7] William K. Ince, remarks prepared for *New Dimensions in International Trade Law*, joint program of the University of Toronto and the Canadian Bar Association.

[8] International Trade Commission, *Certain Surveying Devices*, Investigation 337-TA-68 (July 1980).

[9] International Trade Commision, Publication 1135 (April 1981).

[10] International Trade Commission, 337-TA-54.

[11] Herrington, *op. cit.*.

[12] 45 *Federal Register*, No. 155 (8 August 1980), 52945-46 for notice of Investigation No. 337-TA-88; 46 *Federal Register*, No. 160 (19 August 1981) for request for comments on ITC finding.

[13] International Trade Commission, *Calcium Pantothenate from Japan*, Notice of Preliminary Investigation (603-TAS-5) (20 February 1980).

[14] International Trade Commission, *Steel Jacks from Canada*, Notice of Preliminary Investigation (603-TA-6) (28 April 1980).

[15] International Trade Commission, *Notice of Extension of Preliminary Investigation* (3 July 1980).

[16] 45 *Federal Register*, No. 197 (8 October 1980), 66926, for the proposed order; International Trade Commission, 5 December 1980, for termination and notice of issuance of the order.

[17] International Trade Commission, *Proposed Rule Requiring Country-of-Origin Marking of Imported Steelwire Rope* (20 February 1980).

[18] 45 *Federal Register*, No. 240 (11 December 1980), 81605-81606.

[19] An interesting recent section 337 case regarding the alleged infringement of a trademark is 337-TA-87, *Certain Audio Visual Games and Components Thereof*, 45 *Federal Register*, No. 124 (25 June 1980), 42891.

[20] U.S., Congress, Senate, Finance Committee, *Trade Reform Act of 1974*, 93rd Cong., 2d sess., 1974, S. Report 1298, pp. 31, 165-67.

[21] Robert E. Hudec, "Retaliation Against 'Unreasonable' Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment," *Minnesota Law Review* 59 (1975): 461-539.

[22] "Hurdles Ahead for the U.S.-Canada Tax Treaty," *Business Week* (27 October 1980), p. 125.

[23] Hudec, *op. cit.*, p. 535: "E. A Preview of Section 301: The Cattle War."

[24] The U.S. competitor, Budd, initially sought a preliminary court injunction to block the contract. This request was dropped when the MTA agreed to reconsider the Budd bid if the company were able to arrange similar financing from the U.S. Export-Import Bank. The U.S. Treasury Department has since ruled that the EDC financing was not the determining factor in awarding the MTA contract to Bombardier and did not recommend that the Export-Import Bank provide financing. Budd has also lodged a countervail complaint citing EDC financing and other federal grants to Bombardier; this complaint is currently in the preliminary investigation stage. Parallel to the section 301 complaint, the Special Trade Representative has also registered a complaint at the GATT based on the U.S. position that EDC financing violates Canadian obligations regarding export subsidies in the Subsidies/Countervailing Agreement in that it is inconsistent with the OECD consensus on official export financing.

The Canadian government's position has been that the loan does not violate Canada's obligations and that the EDC was competing with the concessionary terms offered by the French government in support of a bid by Francorail of Paris.

[25] See Jeanne S. Archibald, "Section 301 — The Government Perspective," and Bart S. Fisher, "Introduction: The Enforcement by Private Citizens of United States Rights Under International Trade Agreements," (Washington, D.C.: National Institute on Critical Issues in International Trade Law, 1981).

Valuation for Customs Purposes

6

"The method of Valuation which a country applies can be as important as the tariff rate itself. . . . The customs valuation can be used to impede or promote importation of merchandise."[1]

This description of the role of valuation is taken from the U.S. customs notice describing the proposed change (as of 1 July 1980) in the U.S. valuation system to implement the Tokyo Round agreement. The decision by Canada to accept this agreement, subject to the provision that Canada need not implement it until 1 January 1985, and provided that other countries have agreed on changes in Canadian tariff rates to maintain the level of tariff protection "which would prevail" if Canada did not implement the agreement, will be the most important change in the Canadian commercial policy system resulting from the Tokyo Round. Canada has a system of valuation based on "fair market value," that is, the price at which like goods are sold at arm's length by the exporter in his domestic market, at the same trade level, and in the same quantity. This, in general, is likely to be a higher base for valuation than the base provided in the code: the actual transaction price or export price. Accordingly it would be useful to note the main factors in the negotiation, particularly with regard to the U.S. negotiating position. Then, after looking at the U.S. legislation, we can consider the problems for Canada in implementing the new system.[2]

One may well ask what is the relevance or importance of valuation if it is the case that the weight and balance in the commercial policy system is now on measures of "contingent" protection. With a great number of tariff rates being reduced over the seven-year period of implementation, the importance of valuation will, of course, be greatly reduced. However, in the United States, there will remain product sectors with significant *ad valorem* tariff rates such as petrochemicals, textiles and clothing, and some manufacturers of metal. For these product sectors, valuation will remain of great importance. The same is true of Canada. Moreover, if the Tariff Board recommends, the government accepts, and other countries agree that a number of Canadian tariff rates should be raised to offset the reduction in the

level of protection accorded by the *ad valorem* rates otherwise agreed to in the Tokyo Round using the existing valuation base, there will be a significant number of Canadian tariff items with rates high enough to make the valuation provisions of relevance.

The comments below are in three parts. First, there are some comments on the motives of the various negotiating countries. This should help to make clear why the result of the negotiating process is what it is. Then there is a brief description of the agreement, and of the U.S. implementing legislation. Finally, there are some brief comments on the Canadian "reservation."

In entering the valuation discussions, the United States appeared to have a variety of motives and objectives. First, U.S. officials wanted an agreement that would provide a basis on which the United States could abandon the system of American Selling Price (ASP) valuation for imported chemicals and also the so-called "Final List." This list consisted of an enumeration of the many products that were not valued on the basis of the main U.S. system, but rather on the various other bases in effect when the U.S. valuation system was last revised (by the Customs Simplification Act of 1956). It was often said that the United States had nine different systems of customs valuation. The senior levels of the U.S. customs service were, it appears, strongly of the view that the United States should have one, not nine, systems, and that the one system that would present the fewest difficulties, in administrative terms, would be a "transaction value" system. This could be easily administered on the basis of the commercial invoice and information normally available in regard to transactions.

Secondly, the United States wanted to encourage the EEC to unify their valuation system and the administration of that system. There were wide variations in the application of the Brussels Definition of Value by the various member states of the EEC, although all member states adhered to the Convention embodying this Definition. Given the much wider range of U.S. exports to the EEC, compared to Canadian exports, European valuation practices were a much more important irritant to the United States than to Canada.

Thirdly, the United States wanted the EEC countries to move to a more open, more adjudicatory, system of valuation administration. In a number of EEC countries, valuation rules have not been rules of law. They are merely rules of administrative practice that provide no legal basis for private rights. There has seemed to North American observers to be a good deal of discretion, even arbitrariness, displayed by European officials.

Fourthly, the United States wanted to ensure that the Japanese would revise their system. A U.S. firm trying to export to Japan faced not only a high *ad valorem* rate, but also a requirement that the valuation to which this rate would be applied must reflect a price that

was offered to all other buyers ("freely available" or "freely offered"). The Japanese administrators were prepared to take published list prices as evidence of such prices, but would not accept evidence of discounting from such published prices, despite the fact that such practices were so common as to be almost customary.

Initially, at least, the United States was not at all worried about Canadian valuation practices. American officials took the view that, as far as the United States was concerned, it was of little importance whether or not Canada adhered to any agreement that might emerge. This position was reversed in late 1978, and Canada came under some pressure from Washington to fall in line with the agreement then being worked out, which was at an advanced stage, between the United States and the EEC.

The EEC objectives were fairly obvious. Having failed in the Kennedy Round, they were prepared to try again to get rid of the ASP, and also of the "Final List," in the U.S. system. Moreover, they wanted Canada to abandon the "fair market value" rule. But the most important EEC objective, that is, the objective of the Commission bureaucrats, was to have an agreement that would give the Commission some control over the valuation practices of the customs administrators of the various member states. (Although the Commission is virtually sovereign on tariff rates, it has no specific authority over valuation.) With hindsight, one can see that this interest in bureaucratic empire-building in Brussels ensured that the valuation negotiation would succeed.

The Japanese appeared to have no very detailed objectives. What Japan wanted was for the Tokyo Round not to collapse. If it were to collapse, the protectionist pressures in many countries to which Japan exported would no longer be contained. Japan would only lose in such an eventuality. Thus the Japanese would do what was necessary, in valuation or in other areas of negotiation — but, of course, no more — to ensure that there was a conclusion.

The Canadian position was one of considerable caution. The Canadian customs administration had urged that Canada adopt some sort of commercial invoice price or export price system, primarily for administrative convenience. Moreover, there was an interest in getting rid of the U.S. "Final List," which affected a number of Canadian exports. At senior policy levels, the view was that Canada would have to abandon the "fair market value" system, principally because it could not be effective regarding imports from East and Southeast Asia. It depended for its enforcement on evidence arising outside Canadian jurisdiction and, therefore, was inevitably more rigorous, that is, it was discriminatory, in regard to imports from the United Kingdom and the United States, for example, than from countries further away and with quite different systems of distribution, of exporting, and of accounting and record keeping.

However, there was some concern that undertaking at the same time a major tariff negotiation and a major change in the valuation base was being too ambitious. It might be more than the business community could accept. Moreover, there was a question whether a code could be devised that took Canadian interests into account to a sufficient degree and thus that no subsequent renegotiation of tariff rates would be necessary. Being forced to insist on such a renegotiation could clearly be giving a hostage to the future.

Out of this mix of negotiating motives and objectives emerged an agreement that was said to be intended to reduce the possibility of imports being impeded by harassment over valuation, that is, to reduce the possibility of valuation being used to give additional protection. The central concept of the agreement is that valuation should be based on the actual price paid, and thus that in making decisions commercial information and practice could be used. However, this did not go quite as far as accepting that the stated invoice price in a given transaction was to be taken as being the value of the goods at issue. It was recognized that an invoice price did not always include all considerations that went to make up the price actually paid. Accordingly, the key concept in the agreement is the "transaction price" rather than the invoice price. This meant that much of the code had to be devoted to rules about what to add to, and to subtract from, the invoice price to arrive at the actual transaction price, and what was to be the standard against which a transaction price was to be compared, particularly in the case of transactions between related companies.

A notice in the *Federal Register* outlined the new United States law and summarized the key provisions:[3]

> Section 201 provides for five bases for determining value presented in a hierarchical manner. The first and primary basis is transaction value. If transaction value cannot be determined or if determined, cannot be used, then the second basis, the transaction value of identical merchandise, is used. If transaction value of identical merchandise cannot be determined, then the transaction value of similar merchandise is used. If transaction value of similar merchandise cannot be determined, then deductive value is used. If deductive value cannot be determined, then computed value is used. The Act provides that if none of the five bases can be used, then a value will be derived from one of those bases, reasonably adjusted.
>
> The Act further provides that the importer may elect to have the merchandise appraised on the basis of computed value, rather than deductive value. However, if computed value cannot be determined, the merchandise will be appraised on the basis of deductive value. If deductive value cannot be determined, the merchandise will be appraised on the basis of one of the five bases, reasonably adjusted.

And, later, explaining the central concept of transaction value:

> . . . the transaction value . . . is the price actually paid or payable . . . for the merchandise when sold for exportation to the United States. The "price actually paid or payable" is the total payment, less any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States, made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.
>
> To this payment may be added amounts equal to (1) packing costs incurred by the buyer; (2) any selling commission incurred by the buyer; (3) any "assist" as defined in Section 402 (h)(1); (4) any royalty or license fee the buyer is required to pay as a condition of sale of the merchandise to him; and (5) proceeds of a subsequent resale, disposal, or use of the imported merchandise accruing to the seller. These additions, and no others, may be made to the price actually paid or payable only if they are not otherwise included and are based upon "sufficient information. . . ." If additions cannot be made on the basis of such information, the transaction value cannot be determined.
>
> Certain items will not be included in the transaction value if identified separately from the price actually paid or payable. . . . these items are (1) any cost or charge incurred for the construction, erection, assembly, or maintenance of, or technical assistance provided with respect to the merchandise after its importation; (2) any reasonable cost or charge for the transportation of the merchandise after its importation; and (3) "customs duties and other Federal taxes" payable. . . .
>
> New Section 402 (b)(2) sets forth those factors which may lead to a rejection of transaction value. These factors include: (1) certain restrictions on the disposition or use of the imported merchandise other than those which are imposed or required by law, which limit the geographical area of resale, or which do not substantially affect the value of the merchandise; (2) conditions or considerations attaching to the sale or price of the imported merchandise for which a value cannot be determined with respect to the imported merchandise; (3) cases where proceeds from a subsequent resale, disposal, or use of the imported merchandise accrue to the seller, and an appropriate addition cannot be made to the price paid or payable; and (4) cases where the buyer and seller are related . . . and the transaction value is not acceptable.

These expository paragraphs follow the wording of the U.S. legislation very closely; the U.S. law repeats the structure and much of the wording of the agreement. The proposed Canadian system is worded in

very similar, sometimes identical, terms. The one important change in the U.S. final rule from the proposed Canadian rule is that the cost of freight from the factory to the point the goods enter the United States (so-called "inland freight") is not to be considered part of the price payable, if it is not included in the invoice price in a transaction as between unrelated companies. Nevertheless, the problem of inland freight remains one of the elements of the new U.S. system that raises values for duty; the Canadian Tariff Board has taken note and has recommended that Canada adopt a rule that *all* costs, insurance and freight charges relating to inland shipment of the imported goods be added to the valuation base. This proposal, if adopted, will raise Canadian valuation determinations, particularly for imports from the United States.[4]

There are several other features of the new U.S. system of particular importance to Canada.

First, unlike the Kennedy Round ASP agreement which, if it had succeeded, would have abolished the ASP and therefore brought about a reduction in the protective effect of the *ad valorem* rates in regard to those tariff items that covered goods governed by the ASP provision (mainly benzenoid chemicals), the adoption by the United States of the "transaction price" system did not bring about any reduction in the net rate of protection, or, at least, it was not intended to. To that end, the United States negotiated to secure agreement to a revised schedule of tariff rates for items covered by the ASP and the Final List so that the change in valuation became only a change in administrative practice, not a reduction in the level of protection. This U.S. tactic made it inevitable that Canada would have to insist that the change in the valuation base in Canada be accompanied by changes in nominal rates.

These U.S. *ad valorem* rate changes are set out in subtitle B of title II of the Trade Agreements Act. These rate conversions were the subject of difficult negotiations. Naturally enough, industries seeking protection pressed for conversion to higher rather than lower *ad valorem* rates. Moreover, there was the difficulty that analysis of data of imports from different sources often gave very different results in terms of the calculated *ad valorem* equivalent for the new base. This sort of issue complicated the negotiation in the petrochemicals sector between Canada and the United States.

The second feature of the new U.S. valuation provision, which may turn out to be critical, is the question of the degree of arbitrariness or administrative discretion. To most expert observers in the United States, the text of the statute and the regulations imply a very complicated system. A common Washington comment is that the valuation provisions are the "Customs Lawyers' Retirement Act." In this particular sector of trade law, unnecessary procedural and

information requirements can provide scope for excessive administrative discretion, for discrimination between various parties, for harassment of legitimate import trade, and can result in high costs for retaining legal advice and for protecting the interests either of the importer or of the domestic producer.

It is too early to say whether these concerns are justified. They are related in the main to two related features of the new system. One is the requirement placed on the importer to provide information, perhaps sometimes of a category and of a detail that he cannot reasonably be expected to be able to obtain and, conversely, the authority given the customs authorities to use information derived from other transactions when calculating a valuation based on the value of identical merchandise or similar merchandise in other transactions.

Putting the worst face on it, this could mean that most imports will be valued on the basis of the stated invoice price, but that if the domestic producer complains, an import transaction can be subject to a detailed inquiry, an inquiry that may be very onerous for the importer. It would be useful to look at the proposed Canadian legislation from the point of view of whether or not it can be used to harass importers by the deployment of the requirements for information.[5]

Another feature of the U.S. system, both old and new, is the U.S. concern with "assists." Assists are the additions to the stated invoice price for the value of any assistance (e.g., a die or a set of technical drawings) that the importer has provided to the exporter. Such assists by U.S. firms purchasing from Canadian firms are very common.

The *Federal Register* report describes the concept of an "assist" as follows:

> An assist is an item or service supplied directly or indirectly free of charge or at a reduced cost for use in connection with the production or the sale for export to the United States of imported merchandise. Whereas under the current value law, the existence of an assist requires appraisement under a secondary valuation basis, the new value law provides for the addition of the value of an assist directly to the price to arrive at transaction value. Under the current practice, an assist generally is dutiable regardless of who furnishes the assist. Under the Act, an assist is dutiable only if furnished directly or indirectly by the buyer of the imported merchandise. . . .[6]

There are considerable practical difficulties in the valuation of assists, such as how to prorate over a potential but unverifiable volume of future exports and future domestic sales in the exporting country the value of some substantial assist, for example, a large die for use in a stamping mill. Again, no judgement can as yet be made as to whether U.S. practice under the new law will be free of problems for

Canadian exporters. Of course, as rates over much of the area where assists are relevant move to lower levels or to free over the seven-year period of the Tokyo Round implementation, the importance of this question decreases.

Turning now to the Canadian position and how it evolved, there was support among Canadian administrators, as has already been noted, for moving to some sort of invoice or transaction value. However, there were a number of problems that were, to a degree, special to Canada.

First, there was the question of transactions between related parties. This category covers a major portion of Canadian imports, perhaps as high as 65 per cent. Should these non-arm's-length transfer prices be accepted, or should there be substituted appropriate arm's-length prices, determined by reference to other transactions? Related to this, but distinct from it, was the question of whether, if goods were offered to only one importer and were not available to any other importer willing to purchase, they should be valued on the basis of the price in that transaction or on the basis of an appropriate "freely offered" price. Then there were some categories of imports so-called "seconds," end-of-line goods, used capital equipment, which have long been valued in Canada on an arbitrary basis, that is, by ministerial prescription, because it seemed that import prices were uncomfortably low. These concerns, it developed, could not be easily accommodated in a rigorous transaction price system.

The first position of the Canadians in the negotiation was to try to secure agreement that prices in transactions between related parties did not have to be accepted as a basis for valuation. Valuation in such cases might be determined by reference to such arm's-length prices as might be available.

The draft text of the agreement, at this early period, also contained a proviso that would allow valuation in transactions where the price was not "freely offered" to be determined by reference to such "freely offered" prices as could be found in other transactions. Such a provision was in U.S. law, as it was then, and in Article VII of the GATT. This position, if accepted, would have taken care of part of the Canadian problem of transactions between related parties. Of course, there were the particular Canadian problems of used goods, and so on, that appeared to need special provisions. The U.S. delegation, noting that these special problems related only to Canada-United States trade, opposed providing for them in the agreement but seemed prepared to accept a Canadian reservation regarding them.

The first element in this position was not, in fact, negotiable. The United States was committed to dealing with the problem of transfer prices between related parties by providing for a series of tests, rather than regarding them as unreliable *per se*.

The Canadians sought to retain the proviso on "freely offered" prices and to leave to the end of the day, but not before, the question of some

sort of reservation regarding the impact on tariff rates, on the assumption that not a great deal of rate adjustment would be necessary outside the textile and clothing sectors. This might have been the case if the United States had accepted a reservation on the special cases noted above, and had let the "freely offered" proviso stand. It was thought that the "freely offered" proviso would deal with certain critical problems, such as had been identified in the chemical sector, and that for the rest of those cases where the transaction price was significantly lower than fair market value, there would be no choice but to rely on more vigorous use of the anti-dumping system.

However, the Japanese accepted the U.S. demand to abandon the "freely offered" proviso, and this left Canada isolated on this major issue. Moreover, it developed that the U.S. delegation would not accept a reservation covering the "special Canadian cases."

Meanwhile, Ambassador Robert Strauss came to the view that Canadian adherence to the valuation code was important to avoid trouble in Congress.[7] The Canadian side eventually accepted this view, and from then on the discussion focused on how to state the basis on which Canada could sign the agreement. The results of this discussion are reflected in the terms of the Canadian reservation.[8]

The key point in this reservation is the extent of the changes in the tariff rates that the Canadians might want to negotiate. There could be no objection *in principle*; the United States had followed precisely the same practice in regard to the ASP and the Final List, although of course they did it before, rather than after, the conclusion of the agreement. The problem was, and is, to decide just how big and how troublesome a renegotiation may be involved.

As for the EEC, Viscount D'Avignon agreed that the Canadian position could, in principle, be accepted, but on the assumption that there would be only a few tariff rates of importance to the EEC to be renegotiated. Subsequently, the EEC representatives made the point that what would be at issue would be the effect of the difference between the Canadian "fair market value" system as actually administered and the proposed new system, not the hypothetical effect of the difference between the "fair market value" system vigorously administered in regard to every import and the new system. The Commission insisted that Canada file a formal reservation. This reservation was to make clear that the Canadians would be bound by the rules of Article XXVIII of the GATT. In fact Canada eventually accepted the position of the EEC, as a careful reading of the minister's letter to the Tariff Board makes clear.[9]

The Commission also perceived that the real difficulty was that the impact in *ad valorem* terms of a change to a transaction price system would vary for a given product from one exporting country to another. Should they be asked to agree to a much higher tariff rate because

Canada would be adjusting the rate at issue to reflect the fact that a transaction price from, say, East Asia was much lower than a "fair market value"?

If the outcome of the Tariff Board hearings is a set of proposals to raise a significant number of rates, the resulting renegotiations will be lengthy and likely generate some ill will both in Washington and in Brussels. Clearly, textiles, clothing, and footwear, where export prices are often below home market prices, particularly in regard to exports from East Asia and from developing countries, and where Canadian tariff rates are still significant, and where the EEC is also an important exporter to Canada, will be difficult sectors.

As for the difficult but much less important question of the special Canadian cases, these have been referred to the Tariff Board, in the following terms.[10]

> In cases where the value for duty is now established by Ministerial prescription under Section 39 of the Customs Act (for example used goods, job lots, discontinued lines and other-than-prime quality goods) I would direct the Board to consider whether or not a tariff rate adjustment would be the most appropriate or feasible means of providing the protection now accorded in these cases by virtue of Ministerial prescriptions. In this connection, I would ask the Board to consider whether some of the problems which the current valuation system seeks to address might be better dealt with under other instruments of import policy, including those discussed in the recently published discussion paper on Import Policy.

It is not apparent to this writer just how these cases can, in fact, be dealt with under these other provisions if it is judged necessary to bring about the same effect as imposing values for duty higher than the values that will be determined on the basis of the agreement. It may be that some tariff items will have to be "unbound," that is, taken out of the Canadian schedule of tariff rate obligations under the GATT, or otherwise extensively renegotiated under the provisions of Article XXVIII.

This analysis of the valuation component of the commercial policy system shows how pervasive are U.S. concepts and U.S. legalisms. In this case, Canada has been obliged to accept them, first, through the negotiating impact on the EEC of U.S. policy perceptions and U.S. preferences in drafting, and secondly, through pressure at the political level to accept what was essentially a United States/EEC agreement.

Notes

[1] 45 *Federal Register*, No. 106 (30 May 1980), 37046.

[2] Draft Canadian legislation has been referred to the Tariff Board for a report. See Canada, Department of Finance, *Draft Amendments to the Customs Act: Value for Duty*, August 1980, with press release and letter to the Board; the Board reported on Reference 159 on 15 April 1981.

[3] 45 *Federal Register*, No. 63 (31 March 1980), 20912; the final rule is at 46 *Federal Register*, No. 7 (12 January 1981), 2597–2608.

[4] Canada, Tariff Board, *Report on Reference 159*, p. 55.

[5] Peter Clark, "Canada's Proposed New Customs Valuation Law," *Grey/Clark Trade News* 1 (August/September 1980).

[6] An "assist" as defined in the rules of 152.10(a) — see 45 *Federal Register*, No. 63 (31 March 1980), 20917. The standard technical work on this issue is Herbert L. Warren, *Customs Assists: Identification and Valuation* (New York American Importers Association, 1978). No doubt this work will be revised to take into account the changes in the law.

[7] Gilbert R. Winham, "Robert Strauss, the MTN, and the Control of Faction," *Journal of World Trade Law* 14 (September/October 1980): 377–97.

[8] The text of the reservation is as follows: "Notwithstanding articles 24 and 25 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade (hereinafter referred to as the Valuation Agreement) Canada will implement the Valuation Agreement no later than January 1, 1985 provided that before that date there has been agreement under Article XXVIII of the GATT on such adjustments in Canadian tariff rates as may be needed to maintain tariff protection at the levels that would prevail were Canada not to implement the Valuation Agreement."

[9] The key paragraph of the minister of state's letter to the Tariff Board (Department of Finance, *Press Release* 80–66, 29 August 1980) reads as follows:

> The primary objective of the second phase of the Board's study is to provide advice on what, if any tariff adjustments would be required to maintain the same level of tariff protection or to ensure that duties collected would not decline significantly if the new valuation system were adopted. The level of duties collected should be calculated on the basis of concessions negotiated in the Tokyo Round, or where there were no such concessions, the applied tariff rates. I would expect to receive detailed recommendations in this regard either on an item-by-item basis or whatever other basis seems appropriate. In conducting this study the Board should only examine the valuation system as it existed *and was being applied* at the beginning of April 1979, when Canada announced it would adopt the agreement on customs valuation if certain conditions were met. I would leave it up to the Board to decide what evidence is relevant in this regard. (Emphasis added.)

[10] Department of Finance, *op. cit*

Other Elements 7

While the focus of this study is to bring out the rationale of the central elements in the U.S. trade relations legislation to accord relief from import competition from either "fair" competition or "unfair" competition, there are, of course, a number of other elements in the Trade Agreements Act. Title III provides authority for the President to apply the Tokyo Round Agreement on Government Procurement.[1] Title IV establishes a greatly expanded role for U.S. federal authorities in the regulation of standards,[2] to the end that the unduly trade-restricting effects of standards may be minimized in accordance with the Multilateral Trade Negotiations (MTN) Agreement. Title V provides authority in the implementation of tariff concessions where those concessions go beyond the delegated authority of the Trade Act of 1974. Title VI enacts the changes in U.S. tariffs required by the Civil Aircraft Agreement, a sector arrangement of great importance to Canada. Title VII provides detailed amendments made necessary by the various arrangements negotiated in the agricultural sector. Title VIII provides for the abolition of the wine-gallon method of assessing duties and taxes on imported distilled spirits, thereby removing the incentive to ship distilled spirits to the United States in bulk rather than in bottle. This latter provision is important to Canadian producers of such products and is, of course, related to the "understanding" conveyed to the United States as to how Canadian provincial liquor marketing bodies will price and list imported products to certain U.S. producers.

Title IX provides for a detailed legal mechanism, including administrative procedures and time limits, to enforce United States' rights under the GATT and the various MTN agreements. This involved a rewriting and expansion of the provisions in the Trade Act of 1974. Title X consolidates and revises the provisions for judicial review of administrative decisions. Their operation with respect to countervail has been noted. Title XI sets out a variety of "miscellaneous provisions," of which the most relevant are the extension for a further eight years of the authority to negotiate on non-tariff measures, the

discretionary authority given the President to auction import licences, and a number of detailed changes in the legal basis for U.S. participation in the Generalized System of Preferences. To examine these titles in detail is not only beyond the scope of this study but also not central to its main purpose. Several comments, however, are in order.

As for standards, the implications of the Trade Agreements Act provisions for countries exporting to the United States should best be examined by specialists in this area. Such implications can only be assessed, in terms of the interests of exporters, in the light of at least several years of application. The new provisions regarding the tax and tariff treatment of distilled spirits will also require analysis by specialists in that sector. Clearly they are a major improvement in the U.S. system for taxing imported spirits. Canadian exporters will have a significant interest in how well they function.

Procurement is a key area. A description of the web of existing "buy-American" restrictions has been set out in a recent paper by Warren Grover, who looks at them from the point of view of their impact on Canadian exports.[3] The important point to note from the point of view of this analysis is that the provisions of U.S. law reflect the determination of Congress that countries that do not provide "reciprocal competitive" opportunities for U.S. products in their procurement markets will be denied access to those portions of the U.S. procurement market that are covered by the Procurement Agreement.

For developing countries (countries other than "any major industrial country"), the President is authorized to delay this prohibition for two years,[4] and he is authorized to designate "a least-developed country" as entitled to receive the benefit of the procurement provisions. The drafting of the provisions embodying the U.S. obligation to give "national treatment" to products in the U.S. federal procurement market (that is, the provision giving the President authority to waive procurement preferences), the phraseology of section 302 of the Trade Agreements Act, which creates "authority . . . to provide . . . reciprocal competitive governmental procurement practices," and of section 304 regarding the expansion of the coverage of the agreement, all testify to congressional determination that aside from the special provisions for developing countries and for the least developed, the U.S. procurement market will only be open, on the terms and for the entities specified in the agreement, to those countries that offer reciprocal access for U.S. products.

The requirement for reciprocity in the procurement area is a reversion by the United States to the concept of "conditional," most-favoured-nation treatment, in contrast to the "unconditional" form of the most-favoured-nation clause of Article I of the GATT. The

"conditional" or reciprocal form of most-favoured nation is the form that was preferred by the United States in commercial treaties prior to 1923, and has also been extensively used by many European countries. This re-emergence of the conditional form of the most-favoured-nation provision is a major event in commercial policy and it may well have major implications for U.S. relations with developing countries, particularly with the newly industrialized countries. Of course, they may well be able to offer the United States a measure of reciprocity in the procurement area, as well as in other areas in which the conditional, most-favoured-nation concepts may be employed.[5]

The *Report* of the Senate Finance Committee makes clear that the United States will be seeking reciprocity in future procurement negotiations in the heavy electrical, telecommunications, and transportation equipment product sectors. Moreover, as is made clear in the *Report*, the United States will "seek to explore the possibility of expanding the agreement to cover services such as banking, insurance and communications." The Canadian interest in the U.S. procurement market is in that possible expansion of the agreement, rather than in the present agreement. It is in these product sectors in which the United States is interested in seeking better access in other countries that Canadians have shown an ability to compete.

In both Canada and the United States, purchases of these particular categories of goods are largely in the hands of state and provincial agencies. Accordingly it seems likely that in Canada the co-operation of provincial authorities will be necessary for any substantive negotiation in which Canada would trade better access in the Canadian procurement market for better access in the U.S. market.

The reference to services, of course, offers a whole new area of discussion. It is a category of trade that Canadian trade policy officials are only now beginning to address in any great detail. It has also become of interest to Canadian non-governmental research organizations where studies are just getting under way.

As emphasized above, U.S. legislation on procurement is "conditional" on comparable access being offered by the other country of concern to U.S. producers. Without embarking on any further discussion of the apparent conflict between U.S. implementation of the procurement agreement and the most-favoured-nation provision of the GATT, it is perhaps important to recognize that, publicly and privately, U.S. representatives did make it clear from the beginning of the negotiation of the Procurement Agreement that they could not contemplate giving access to whatever portion of the U.S. procurement market might come under the code to countries that were not providing comparable access.[6] Politically, it would have been unrealistic to proceed on any other basis. However, the fact that the United States has opted for "conditional," most-favoured-nation treatment in

this area opens the possibility that the United States might be prepared to open its procurement markets on a basis of reciprocity substantially more than the present agreement calls for. The main implications for Canada of the U.S. procurement legislation are thus for the future.

There is, of course, a less important but more immediate question. Will Canada emulate the United States and give the benefit of the Procurement Agreement only to signatories, or will Canada adhere rigorously to Article I of the GATT, and offer these benefits on an unconditional, most-favoured-nation basis? This latter course was what Canada did in the implementation of the Kennedy Round Anti-dumping Code. From the point of view of cultivating relations with developing countries, unconditional, most-favoured-nation treatment might appear to be appropriate. From the point of view of furthering the interests of Canadian producers, particularly those who might profit by better access to the U.S. procurement market, the conditional approach, based on reciprocal legal rights and a measure of reciprocity of access, would appear to be preferable.

Notes

[1] There is a useful compendium of U.S. views on the "Government Procurement Agreement" in *Law and Policy in International Business* 11 (1979): 1263–358. United States law implementing the code is Trade Agreements Act, title III and 46 *Federal Register*, No. 3 (6 January) (Executive order 12260, 31 December 1980).

[2] See 45 *Federal Register*, No. 242, 82153, for standards role of the Department of Agriculture.

[3] Warren M.H. Grover, Q.C., "Problems of Exporting to the United States," a paper prepared for *New Dimensions in International Trade Law*, University of Toronto and Canadian Bar Association, 1980, pp. 14–37.

[4] Section 302 (b)(1), as set out in title III of the Trade Agreements Act of 1979.

[5] For a detailed examination of the most-favoured-nation clause, see *Report of the International Law Commission* (on the work of its thirtieth session) General Assembly, Official Records, Thirty-third Session, Supplement No. 10(A/32/10). For comment on the conditional form, see pp. 72–86.

[6] The two-year "waiver" for developing countries does no more than provide a period in which the more industrialized developing countries can assess the balance of advantage.

Summary and Conclusion 8

The purpose of this study has been to describe the evolving U.S. "contingency" protection system and to demonstrate how pervasive is the detailed impact on Canada. Because it is essentially a review of the U.S. system, concentrating on the most important features, it has been convenient to note the implications for Canada in regard to each main portion of the U.S. system of contingent protection. We have shown that one immediate impact is the development in Canada of a structure of commercial policy legislation that is broadly similar to the U.S. scheme, both in its general structure and in detail, although, of course, there are some important differences. The similarities are clearly shown on every page of the *Discussion Paper*, including the draft bill. This is also true of the Canadian draft valuation system. In the major area of procurement policy, the Canadian provinces have been following or emulating their American neighbours in putting in place "buy-national" and "buy-provincial" policies.

This pervasive impact of the style and language — and more importantly, concept, format, and structure — is not only the result of the United States being Canada's largest customer, and of Canada being a North American country influenced across the board by U.S. style in the approach to law and law making. The key factor now at work is the impact of U.S. concepts on the drafting of international agreements. In implementing Canadian Tokyo Round obligations, and in rewriting Canadian law to take advantage of GATT and Tokyo Round agreement rights, Canadian draftsmen are translating into Canadian legal phraseology the words and phrases of the agreements that so frequently are American words and phrases.

But more important than the language, of course, is the structure of the Canadian system. With the revamping of the retaliatory power proposed in the *Discussion Paper*,[1] Canada will have, when the legislation is enacted, a system of contingent protection very much like the U.S. system, except that the words "fair" and "unfair" have not been used to classify the import competition at issue although they are now beginning to be used by official spokesmen.[2] The one element that is lacking is a comprehensive residual or "catch-all" provision

governing certain other "unfair trade practices," such as is provided by the revised section 337 of the U.S. Tariff Act. The one element that is additional in the Canadian system is the proposed "basic price" system.

On the institutional side, the key decision in Canada to follow the U.S. model was the decision after the Kennedy Round to set up the Anti-dumping Tribunal. An alternative would have been to have departmental hearings and to have met the procedural requirements of the agreements, as the Commission of the EEC does, by a more informal, in-house administration. However, the example of the U.S. Tariff Commission was before Canadians, and the political logic of following that example was compelling.

It may be that in due course the adjudicatory functions of the Tariff Board — appeals on valuation, tariff classification, the amount of anti-dumping duty to be collected in a particular transaction, liability for manufacturers sales tax — will be split off from the advisory functions of the Board, which relate to economic considerations, and will be assigned to an International Trade Court. The need for this may be evident as we consider whether our institutions in the commercial policy area are really adequate to the tasks assigned to them under the proposed Special Import Measures Act. It would therefore be useful to consider whether the reasoning that led Congress to add to the power of the U.S. Customs Court and to turn it into the court of primary jurisdiction for all international trade cases — the need to establish clear areas of jurisdiction — is not also relevant to Canada. If Canada were to follow the U.S. model, the economic functions of the Tariff Board could be merged with the work of the Anti-dumping Tribunal (which is, according to the draft act, to become the Canadian Import Tribunal) in a new Trade Tribunal. In any reconsideration of our institutional arrangements, we are bound, as always, to import much by way of example.

The economic impact on Canada of the development of the U.S. system as set out in its revised legislation, with its growing emphasis on "contingent" protection, is difficult to assess, certainly impossible to quantify. In this study we have explained how the U.S. law works by reference to some actual cases and, where possible, to cases involving Canadian exports. It seems that at this early stage a few important questions can be posed or propositions stated by way of a conclusion.

First, accepting that the anti-dumping system (including such devices as the TPM) is likely to be the most frequently used of all the mechanisms of contingent protection, the impact on Canada will relate to two factors. One is how frequently and extensively Canadians may dump in the United States. The second is how meaningful is the requirement to show at least a threat of material injury. On the first point, one may assume that one important reason, though not the only

reason, for Canadian dumping in the United States is the U.S. tariff. As U.S. tariffs are reduced, many of them to zero, over the seven-year period of the Tokyo Round implementation, this motive for dumping will become less relevant. Another reason for dumping by Canadians is the presence of the Canadian tariff, which makes it occasionally possible for some Canadian producers to extract a higher price in Canada than the going international price. Of course, Canadian producers do not always price up to the tariff, perhaps because of competition within Canada, but they sometimes do. This practice means they must dump to compete in the United States or in parts of the United States.

As Canadian tariffs are reduced, many to zero, over the period of the implementation of the Tokyo Round, this motive for dumping by Canadians will also be weakened. But there will still be some significant U.S. and Canadian tariffs as well as other factors, such as differences in the cost of transport to the market. All these will mean that some Canadian firms may dump in the United States.

With respect to the second point, it is too early to say whether the test of injury established by the Trade Agreements Act is sufficiently rigorous to ensure that cases of dumping that have no significant impact will be turned aside. There are some observers, including Professor Metzger, who feel the test of injury under the act, taking into account the problem of interpreting the concept of cause, leads to injury or threat of injury being found if the dumping at issue has had any impact more than trifling and if any causal link can be shown between the dumped imports and the poor performance of the industry. There are others, such as Matthew Marks, who have noted that in endorsing the standard of injury as used by the International Trade Commission in cases between 1 January 1975, and July 1979, Congress was perhaps putting to rest the proposition that material injury is any injury more than trifling. This would be a useful raising of the standard, compared with pre-1975. On the other hand, Marks[3] has pointed out that it seems, looking at the record to date, that the addition of the word "material" has been meaningless. Clearly, much more experience will be necessary before any real judgement can be made. The fact that so many cases have been thrown out at the preliminary stage, on the basis that there is "no reasonable indication" of injury, suggests that the preliminary hearing serves a useful purpose of turning off those cases that should not proceed. This reduces the potential for harassment of legitimate imports.

From an economic standpoint, it seems clear that if many Canadian firms dump in the United States and the material injury standard is not meaningful, Canadian exports will be adversely affected. It will be difficult to make an assessment because the effect of a too rigorous system will be in terms of firms deciding not to export to the United

States rather than merely a list of anti-dumping actions. It is useful, too, to keep in mind the policy problem raised by Metzger, and also by Ehrenhaft, that the anti-dumping system in the United States (and in Canada too) perhaps operates more rigorously against price competition from imports than do the provisions against price discrimination in domestic commerce. This is a major economic policy issue that should be examined in Canada, regardless of what happens in the United States.

As for countervail, the major economic effect on Canada arises from the asymmetry between the two countervail systems. United States countervail against Canadian subsidies can have a decisive impact on the willingness of firms to accept subsidies in Canada. However, Canadian countervail proceedings against similar U.S. subsidies will be merely an irritant; they will not prevent firms (including Canadian firms) accepting subsidies to build plants in the United States.

It can be foreseen that if there are a few more cases like the *Michelin, Glass Beads*, and *Optic Liquid Level Sensors* cases involving a range of Canadian provincial and federal assistance, businessmen will become increasingly doubtful about accepting subsidization in Canada. There is really no way of knowing, except on an anecdotal and accidental basis, just how many firms have already rejected the idea of working in Canada because of the very concrete threat of U.S. countervail made evident by these cases.

Within Canada, the impact of this imperceptible development will be adverse for those areas of Canada that must have subsidies to attract industry. On the other hand, the impact will be favourable for those areas where firms do not need subsidies, in that firms that wish to locate in Canada will have an even higher preference for locating in such prime locations.

Here again the meaningfulness of the injury test is all too relevant. A tough injury test would, as a practical matter, remove the threat of U.S. countervail, for the reason that Canadian exports (even those from plants that have been subsidized) are not likely to have a damaging impact on U.S. firms. Canadian regional subsidies rarely do more than offset for an initial period the additional cost of locating in some disadvantaged area of Canada. However, if the requirement to show a threat of injury means no more than that there must be a showing of some competitive impact of subsidized goods, the impact on Canadian regional development and research and development programmes will be severe.

This is made all the worse by the provisions regarding "offsetting," as examined above. This seriously increases the rigour of U.S. countervail as it may be applied in cases involving regional economic assistance. Of course, this possible adverse impact on Canadian industrial development cannot be measured. Like the problem of

asymmetry, it surely requires consultation between Canada and the United States in order to work out a more effective understanding circumscribing the use of this punitive weapon.

As for the escape clause, the principal problem is that Canadian exports from time to time do get caught up in cases related to imports from other sources. While one can fault particular parts of certain "escape clause" reports, by and large it would be difficult to make a general case that the United States implements escape clause measures when they are not warranted. This judgement is relevant to the current "voluntary" restraint on automobile exports from Japan, which is a substitute for an escape clause action; it is not at all clear that the United States could not have met the criteria of Article XIX of the GATT.

The broader question that should be asked concerns the thrust of the whole contingency protection system as it has developed in the United States and been reflected in the Tokyo Round agreements. That question is whether what has been created is an apparatus of law that can be used to intervene in international trade in a highly selective and arbitrary fashion and to extend the area of administered trade and the scope for market-sharing arrangements. The centrepiece is clearly the anti-dumping system, and the key factor is the level of impact involved in material injury. The Trigger Price Mechanism for steel, which derives its administrative and legal force from the anti-dumping provisions, is one example of how the "contingency" system can lead directly to a system of administered prices, that is, to a system involving selective and arbitrary intervention. The anti-dumping case on automobiles, which was discontinued in circumstances that led many observers to conclude that the discontinuance was linked not only to price assurances from exporters but also to the decision by Volkswagen to build a plant in Pennsylvania, reveals a different sort of intervention to which the "contingency" system can also easily be adapted. Given an injury test with a low threshold, and procedures that give producers detailed rights, the technique of "undertakings" could be deployed to create an increasingly arbitrary and anarchic system. And Canada proposes to add provisions for a formal basic price system, in this respect going further down the road of contingent protection than has the United States.

In the light of these considerations and these developments, it is certainly not clear that a commercial policy system based on the provision of contingent protection is necessarily more liberal, in conventional trade policy terms, than a regime of bound tariffs. For a country such as Canada that must export such a large volume of its GNP to the United States, this could be a negative and costly policy development. Developing our own contingency measures will be no substitute for secure and certain access to the U.S. market. It was such

access which it was thought by some would be achieved over the years by bargaining for reductions in U.S. tariffs.

Notes

[1] Canada, Department of Finance, *Proposals on Import Policy: A Discussion Paper Proposing Changes to Canadian Import Legislation* (Ottawa: Minister of Supply and Services Canada, 1980), pp. 14–15.

[2] Honourable Pierre Bussières, Minister of State for Finance, "Speaking Notes" to the Subcommittee of the House of Commons Standing Committee on Finance, Trade and Economic Affairs, 13 April 1981, p. 5: "unfair injurious reports."

[3] Matthew J. Marks, "Recent Changes in American Law on Regulatory Trade Measures," *The World Economy* 2 (February 1980): 427–40.

Comments on Proposals on Import Policy

A

The *Proposals on Import Policy* set out in the July 1980 *Discussion Paper* being considered by the Subcommittee provides for the necessary recasting and modernization of Canada's import legislation. This memorandum sets out certain criticisms and makes certain suggestions for changes; however, merely because there is no recitation of the many points in the proposals with which I agree, it should not be assumed that my view is negative. The proposed import legislation is critically important for a country to which trade is important and, therefore, every effort should be made to make the legislation adequate for dealing fairly and impartially with the many and complex issues of import policy.

I propose to address what I consider to be six major problem areas: (1) the absence of provision for an adequate preliminary inquiry into the question of injury, in regard to the use of anti-dumping or countervailing duties; (2) the proposed "Basic Price System"; (3) the absence of adjustment assistance provisions in the legislation regarding imports that cause or threaten *serious* injury to Canadian producers of "like or directly competitive" products (section 7.1(2) of the Customs Tariff, p. 74 of the *Discussion Paper*); (4) the question of "cause"; (5) the special problem of dumped or subsidized imports of capital equipment; and (6) the proposed institutional and administrative arrangements.

The Technique of the Preliminary Inquiry into Injury

The Canadian anti-dumping system is regarded by some producers in other countries who export to Canada as being very harsh. Essentially this is because they regard such inquiry into the evidence of injury as is carried out by officials of the Department of National Revenue when initiating an investigation as being at best perfunctory (section 16 of

This paper was submitted by the author to the Subcommittee on Import Policy of the House of Commons Standing Committee on Finance, Trade and Economic Affairs, 30 September 1981.

the proposed act, p. 45 of the *Discussion Paper*). When a preliminary determination of dumping is made, a provisional duty equal to the estimated margin of dumping is levied; meanwhile the Anti-dumping Tribunal addresses the question of injury. The Tribunal may find that no injury has been caused (or that the degree of injury caused is less than material) or that no injury is threatened, or perhaps that there is a threat of injury, if the dumping continues, but that injury has not yet been caused by the amount of dumping that has taken place. However, in all these situations, provisional duty will have been collected.

For the trade in certain products, the imposition of a provisional duty, and the threat of a definitive duty being levied, may have a marked impact on the willingness of importers to import, or of Canadian purchasers to continue purchasing. The Kennedy Round Anti-dumping Code and the Tokyo Round revision require that the question of possible injury, and the question of whether or not there is dumping, should be considered together in the taking of the decision to indicate an anti-dumping investigation, and they should be looked at simultaneously throughout the investigation and, in particular, from the point in time when provisional action is taken.

The wording of the agreement on this question of "simultaneity" is not very clear; it reflects the fact that in the Kennedy Round, the EEC (then Six) and the United Kingdon pressed the United States to revert as far as possible in the direction of the administrative system that had existed in the early 1950s in Washington. In that system, the facts of dumping and of possible injury caused by dumping were examined by *one* body of officials at the same time, who could stop an investigation if they concluded that there was either no dumping or no injury.

The United States had replaced this unified system with a two-stage, sequential system; first the question of dumping was examined (in the Treasury), and then the question of injury was examined (in the Tariff Commission, now the International Trade Commission). It was argued, correctly, that this two-stage procedure meant that some dumping that did not cause or threaten injury was the subject of provisional action; accordingly, the EEC and the United Kingdom pressed the United States to accept some undertaking that they would look at the injury question when deciding to initiate an investigation. The "simultaneity" provisions of the Kennedy Round code are the result.

It became clear that the most the U.S. Treasury could do, unless Congress changed the law, was to ask for information from the complainant as to the impact on the industry concerned of the dumping being complained of. When the Canadian anti-dumping legislation was being drafted, it was decided that it would not be appropriate for the Canadian system to go further in the direction of

inquiring "simultaneously" into injury and dumping than could the United States — hence the language of section 16(1) of the act (p. 45 of the *Discussion Paper*) which requires the deputy minister (or the Tribunal, in the case provided for in section 16(4))to form an "opinion that there is evidence" that the dumping has caused or threatened injury. To form an opinion as to whether or not there is evidence is a long way short of holding any sort of preliminary inquiry; it means that a complaint of dumping, if substantiated, is likely to result in the imposition of provisional duties, even if there is no injury and thus to make dumping in Canada a risky course of action. In 1968, after the Kennedy Round, the view was that the U.S. system, even with the modifications resulting from the Kennedy Round code, was a harsh and rigorous system that could impose heavy costs on dumping which might, in fact, have little or no impact on U.S. producers. There seemed no reason to make the new Canadian system less rigorous.

However, the United States, in the legislation implementing the Tokyo Round agreements (the Trade Agreements Act of 1979), has moved a significant distance toward greater "simultaneity," in that it is now provided that there be a "preliminary" inquiry into whether or not there is a "reasonable indication" of injury being caused by the alleged dumping. This inquiry by the International Trade Commission (ITC) is run in parallel with the early stages of the inquiry by the International Trade Administration (of the Department of Commerce, which has taken over this function from the Treasury) into the question of whether or not there is dumping. If the ITC finds that there is no "reasonable indication" of injury, the whole investigation ends. If, however, they find there is a "reasonable indication," then the Commerce investigation proceeds to the stage of a preliminary determination being made as to dumping; if that is positive, then the definitive inquiry into injury by the ITC begins, and provisional anti-dumping action is taken.

However, since the 1979 act came into force, a number of preliminary inquiries have found "no reasonable indication" of injury; in these cases the anti-dumping procedures have been terminated. This new U.S. procedure is an important element in the U.S. system; Canadian exporters will realize that it has protected them against unwarranted anti-dumping action, and particularly against the costly, indeed damaging, imposition of provisional measures when no material injury was caused or threatened to U.S. producers by Canadian dumping. On the other hand, it can be argued that having screened out those situations when there is no reason to believe injury is caused or threatened, it is reasonable to impose a fairly rigorous and potentially costly procedure in regard to those other cases in which it has been found that there is a reasonable indication of injury. If this new U.S. system seems more just, from the point of exporters to the United

States, then the same would be true for Canada. The rigour of the Canadian procedure, which involves imposing a provisional duty in situations in which it may later be determined that no injury was caused, would be more acceptable to consumers in Canada and to exporters in other countries if there was a systematic screening out of all those situations in which there is no reasonable showing of injury.

In my view, producers in the major industrial markets who export their surplus production at dumped prices to the smaller Canadian market and thereby injure Canadian producers should be precluded from so doing by effective anti-dumping action. However, there is no need to counter dumping that has no material impact on Canadian producers. More importantly, a rigorous Canadian system, making use of all rights available under the code, would be more acceptable to other countries if we had met the "simultaneity" obligations as fully as has the United States.

I hope that your Subcommittee will consider, therefore, whether the functions of the proposed Canadian Import Tribunal should be broadened to include preliminary inquiries into injury, and thus that the limited recourse to the Tribunal provided for in section 16(4) be broadened to provide for inquiry into the existence of evidence as to injury in regard to all anti-dumping investigations.

The same considerations apply in regard to the question of injury in regard to subsidy investigations (under proposed section 19).

The "Basic Price System"

The *Discussion Paper* sets out, in Proposal 4, the concept of a "Basic Price System" to be used in "exceptional circumstances." What is contemplated is a regime of minimum import prices to be established when there is dumping from a wide variety of sources or a wide variety of the products of a single industry. Unlike the established anti-dumping system, the basic price system would involve no formal determination of dumping or of injury.

The notion of establishing a set of import prices, and penalizing any import sales at less than those fixed prices, has long been attractive to those seeking protection against imports; variations of this technique have been common in agricultural trade (the EEC's variable import levy on wheat is one example), and Canadian representatives, under the instructions of ministers, have been highly critical of such systems.

As the *Discussion Paper* notes, it "could afford speedier protection for Canadian producers" than the regular anti-dumping system. The question is, if "speedier protection" is necessary, should it be sought through the use of this device, or in some other manner?

It has been asserted that the Anti-dumping Agreement contemplates the use of a basic price system. This is, in my view, an

incorrect reading of the agreement. The purpose of the particular provision was to accommodate those countries that had basic price systems rather than the sort of system to which the rest of the agreement was directed. It was not intended that a signatory might choose the option of a basic price system for particular areas of trade.

Comparison between the proposed basic price system and the U.S. "trigger price mechanism" for steel is made in the *Discussion Paper*. The important point is that, in the U.S. system, an import transaction below the scheduled trigger price may lead to an anti-dumping investigation, unless it has previously been established that the imports in question are not dumped. In the proposed Canadian system, a sale below the basic price would lead to the imposition of an anti-dumping duty. This is a distinction with a difference; without accepting that the U.S. system is consistent with the agreement, it is clear that it is much less inconsistent with the agreement than the proposed Canadian system, which involves the levying of anti-dumping duties on goods that have not been the subject of a preliminary determination of dumping nor of an injury determination.

Canadian exporters of steel to the United States who have been able to sell below trigger prices should be able to see the difference between the two systems.

In interpreting the Tokyo Round agreements, it must be kept in mind that they are not tightly drafted legal instruments comparable to a domestic statute. They are hastily drafted, negotiated documents that try to set out what is agreed in language that takes some account of the different legal and administrative practices in a variety of jurisdictions. Thus it is imperative to consider "legislative history" and "legislative intent." As one of the draftsmen of the Kennedy Round and Tokyo Round anti-dumping agreements, I believe I can state with some authority that it was not intended that the basis price provisions be used in the manner proposed in the *Discussion Paper*.

Of course, in the sort of "exceptional circumstances" set out in the *Discussion Paper*, it may well be necessary to intervene to regulate and control the competition of imports with domestic production. The international rules do, of course, provide for such intervention, but they are in Article XIX, the so-called "Safeguard" clause of the GATT, not in Article VI and the Anti-dumping Agreement. Article XIX allows for control of imports when "serious injury" is caused or threatened by imports; that article has its own rules and its own criteria for action; the domestic legislation, for Canada, is set out in the proposed section 7.1 of the Customs Tariff (p. 74 of the *Discussion Paper*).

A final point of importance — the proposed system is not only inconsistent with the GATT and the interpretive agreements, it is not in Canada's interest as a trading country. If it were agreed that

Canada might have the option of a basic price system, other GATT countries would also have such a right. Such a system, if applied by a major trading country such as the United States to Canadian exports, would afford "speedier protection" for their producers. It does not seem to me that this would be in Canada's interest. Article XIX, in contrast, provides for protective action when it is really necessary, and under a set of rules that affords some protection to exporters.

No case has been made in the *Discussion Paper* that Article XIX (and the related Canadian legislation) is not adequate for our needs; moreover, the *Discussion Paper* does not examine the impact on our export interests if other countries were to abandon the rules of Article XIX and adopt minimum import price systems to deal with import competition.

In the light of these various considerations, I urge the Subcommittee to recommend against Proposal 4 and to consider instead whether the proposed provisions of section 7.1 of the Customs Tariff are adequate for Canadian circumstances.

Adjustment Assistance and "Serious Injury"

There has been considerable international discussion as to whether or not when a GATT signatory acts under Article XIX, and takes emergency action against imports causing or threatening "serious injury," it should also have an obligation to demand evidence of adjustment to the import competition by the domestic industry, and to have available some programme of assistance for that process of adjustment. The Canadian position has been that to make adjustment (and adjustment assistance) mandatory in all Article XIX cases would be unreasonable. There are cases where Article XIX action is justified but where no adjustment to the import competition could reasonably be required. Examples are the use of Article XIX measures by Canada to deal with so-called "seasonal" problems of import competition in the horticultural sector.

However, it is interesting to note that the United States has long had provisions for adjustment assistance (for workers, for firms, for communities) in its Article XIX legislation. This has enabled the President, in certain cases, to opt for adjustment assistance to the affected industry rather than choosing to restrict imports. Such action has, in certain cases, been important for Canadian exports to the United States. Canada does have some experience with adjustment assistance under the Automotive Program and there are various measures of assistance available to industry from the federal government and provincial governments. However, neither the present nor the proposed Canadian legislation (section 7.1 of the Customs Tariff) explicitly provide for the "adjustment option."

Clearly, this is a complicated, complex issue; the Subcommittee may wish to ask for a policy statement from the government on this issue and then to consider whether its inquiries should be broadened to include this issue.

Injury "Caused" by Imports

The GATT, in Article VI and in the agreements on anti-dumping and countervail, and the Canadian legislation speak of dumping that causes (or threatens) injury or of the subsidization of imports that cause (or threaten) injury. The GATT, in Article XIX, speaks of imports that cause or threaten serious injury. What is involved is the impact of the imports at issue on the domestic industry, that is, the domestic producers of like or competitive products. The general well-being or state of health of the industry in question, whether it is suffering other injuries from other adverse factors, is irrelevant; it is the adverse impact of the dumped imports, the adverse impact of the subsidization of imports, which is at issue. Is there an adverse impact (i.e., injury) and is that impact "material," in regard to dumping and subsidization, or "serious," in regard to Article XIX situations?

The Kennedy Round Anti-dumping Code spoke of actionable dumping as having been the "principal cause" of the injury found to exist. It was the view of the Canadian government at that time that this formulation was inconsistent with Article VI of the GATT, and that it led to the illogical result of making available the remedy of anti-dumping duties for an industry that was suffering from no other adverse factor, but denying it to an industry that was also suffering from other adverse impacts in addition to dumped imports. This view of the Canadian government was set out in testimony before the Standing Committee of the House of Commons that examined the proposed Canadian Anti-dumping Act in 1968.

The Tokyo Round revision of the Anti-Dumping Agreement abandoned the illogical "principal cause" language and accepted a Canadian formulation on this issue; this formulation was also used in the agreement on countervail.

In the United States, there is a tendency to equate the notion of injury with the ill-health of the industry and then to consider what sort of causal relationship must be found between that overall state of being injured and the dumped (or subsidized) imports, or the imports being considered for Article XIX action, to warrant action being taken. This has created difficult issues of interpretation and has led, in my view, to U.S. producers being denied protection against imports that might well have been justified under the GATT rules. (A case in point is the inquiry last year by the International Trade Commission into imports of motor vehicles.) The structure of the causality provisions in the U.S. Article XIX legislation and in the new U.S. anti-dumping and

countervail legislation is quite different, and this has led to much confused interpretation. Specifically, there is the view, which has been expressed in Congress, that in a case of dumping, for example, it is necessary only to establish that the domestic industry is in a state of injury, and that dumping is one of the causes. In my view, this is not what Article VI of the GATT states, nor is it what the causality provisions of the new agreements state. What they speak of is imports that in themselves cause such an adverse impact as can be described as material injury. The version of causality set out at page 18 of the Submission of EEMAC, April 1981, is one that if it were to be adopted by the United States, would lead to many findings of injury being caused by Canadian dumping; if it were adopted in Canada, there would be a multitude of anti-dumping cases that our trading partners would find unacceptable. Given the prevalence of dumping in international trade, it is not surprising that it is only dumping that itself causes material injury which is, under the GATT, actionable. The standard of material injury is not, as I read the agreements, an unreasonable high standard.

If the Subcommittee were to pursue this issue, they would find that there is, at present, a good deal of confusion in U.S. legal circles and within the administration about the concepts of "injury" and "causality." They have become legal concepts devoid of economic meaning. Clearly there will have to be further international discussion of these issues. I would urge that, in the meantime, the causality language as contemplated in the draft act be retained.

Dumped or Subsidized Capital Equipment

The Subcommittee has received detailed briefs (from EEMAC and from Canadian General Electric) concerning the particular problems caused for Canadian producers by dumped and/or subsidized capital equipment. The dumping of equipment for the generation and distribution of electricity causes very special problems of great economic importance. These are fully detailed in the briefs I have referred to and the inadequacy of the present anti-dumping system, as it is administered, are fully noted. With most of what these briefs say, by way of description and explanation, I agree. I would like to note some additional considerations.

First, there is the problem identified as the "free bite." However, it is open to the deputy minister, I suggest, on his own initiative, if he is of the opinion that there is dumping of such capital equipment from many sources and that there is injury, to launch a comprehensive anti-dumping investigation. The definition of the categories to be investigated, and the sources of such imports, are for the deputy minister to decide. It was precisely in order that the deputy minister could initiate action on such important cases that in the Kennedy

Round negotiations Canada resisted the proposal that an anti-dumping action could only be initiated by a complaint on behalf of the industry. Agreed, that would be the normal case, but the right of government to initiate anti-dumping action was preserved.

If it were held that Canadian law, as drafted, does not allow such a broad initiative by the deputy minister, then the Subcommittee should urge that the law be re-drafted to permit it. Such action would be consistent with the GATT and the agreement. My view is that the dumping of electrical equipment into Canada has been taking place on a wide scale, from many sources, and that is manifestly injurious, and that the GATT and the Tokyo Round code do not preclude providing the remedy of an anti-dumping duty.

Secondly, the submissions referred to above have identified a real problem in making an anti-dumping duty an effective remedy in the case of electrical equipment where the user, in negotiation with the producer/exporter, insists that such producer/exporter bear the risk of an anti-dumping duty being levied by setting up a subsidiary in Canada to act as "importer of record." Given that the purpose of an anti-dumping duty is to neutralize the margin of dumping, and thus to ensure that the purchaser is not influenced by the lower price made possible by dumping, it would be not unreasonable to provide that in cases where the purchaser has caused an importer of record to be created so as to avoid the anti-dumping duty, the law should look through such an arrangement and treat the Canadian purchaser as the real importer, and liable for the duty. However rational such a proposal may be, (the rationale is set out fully in the EEMAC and CGE briefs), it might well be that the proposal would be bitterly opposed by any provincial utility that has adopted this purchasing technique. It is likely that the application of the measure recommended would be the subject of litigation and would be, at the very least, politically controversial. Nonetheless, the case for dealing with this abuse is so compelling that, in my view, there ought to be provision in the legislation allowing for the substantive importer to be treated as being the importer of record for anti-dumping purposes.

There is, however, an alternative approach that may yield comparable results, and that may, in some cases, be more appropriate than the proposal of EEMAC and CGE. In U.S. law, if the exporter undertakes to reimburse the importer for any anti-dumping duty levied, that is treated as being an additional margin of dumping, and therefore that additional amount is levied (the U.S. law precludes this being done more than once; if the exporter reimburses the importer for the additional duty, further reimbursement does not create a further liability or duty). Much the same result is arrived at under the proposed Canadian law (section 13(3), p. 44 of the *Discussion Paper*).

I would argue that this proposed section might well cover the case described in the EEMAC and CGE briefs; the procedure that they

allege has been used certainly involves the exporter/producer paying the anti-dumping duty on behalf of the real purchaser. Moreover, there is the consideration that an importer which is a controlled subsidiary of an exporter is merely an agent or arm of the exporter for the purpose of clearing the goods through customs and creating an entity liable for any anti-dumping duty. In such a situation, it would make economic sense to look through the arrangement and to treat the importer as being a manifestation of the exporter, and that the arrangements constitute an agreement of the kind provided for in section 13(3). Such an administrative practice, involving as it does the risk of an anti-dumping duty twice the margin of dumping, if combined with the institution of a more comprehensive investigation of the dumping of categories of capital equipment, as suggested above, might go as far as is possible in the use of the anti-dumping system to deter this particularly injurious, indeed predatory, form of dumping from the major industrial countries into Canada.

Thirdly, the critical issue of the dumping of heavy electrical equipment in Canada is an issue that goes beyond the relatively simple issue of making our anti-dumping system work. It is beyond argument that, by and large, the countries whose producers of such equipment dump in Canada do not allow the producers of other countries to compete in their own domestic market. Indeed, it is this system that makes dumping in Canada feasible. Producers in those countries have a sure domestic market from which they can extract advantageous prices. They usually are able to write off all research and development costs against domestic sales. In current economic conditions, they will be prepared to dump extensively in order to keep production teams intact and plants operating. The dumping in Canada is, it seems to me, predatory in intent — that is, it is designed to destroy competition from Canadian producers in Canada and in third markets. It seems to have been assumed that Canada can react only by making more effective use of its anti-dumping system, and that we have to accept the restrictive practices in other countries because the goods are bought by state agencies, that is, that the practices are covered by the exemption from the GATT rules on national treatment (Article III) for government procurement. This is not the case. Article III does provide an "out" from certain GATT rules for government procurement, but this exemption is narrowly drafted. Specifically, it does not provide an exemption for government purchasers of goods for resale, or *for goods for use in the manufacture of goods for sale*.

One might accept that the provision of telephone service or postal service is a service, not a good, and that therefore the government procurement exemption of GATT Article III is broad enough to cover the restriction on purchasing of equipment for telephone and postal services. However, water and electricity are *goods*, and the procure-

ment exemption of Article III does not allow governments to give a preference to domestic goods when purchasing goods for the production of such goods for sale. Thus the practices that EEMAC and CGE complain of, and that make economically feasible the dumping of heavy electrical equipment in Canada, are an unfair trade practice inconsistent with the GATT. (There is U.S. case law to this effect.)

There are, therefore, various courses open to Canada, over and above the more skilful, more rigorous administration of the anti-dumping system. For example, a complaint could be laid under Article XXIII of the GATT that the benefits of the GATT were being "nullified and impaired" by the practices at issue. This could lead, after what would be a long and tendentious process, to Canada being authorized by the contracting parties to apply compensatory measures. This presumably could take the form of prohibitory tariffs or restrictions on imports of such goods from the countries concerned. Obviously, the countries concerned would endeavour to impose some cost on Canada, and this would be so no matter how decisive might be the verdict of the international community. Alternatively, and this would be a real risk, efforts would be made to prevent the contracting parties ever reaching a conclusion. The scope for delay on such issues is almost without limit.

An alternative course, for which there are precedents, would be for the government to act under proposed section 7(2) of the amendments to the Customs Tariff (pp. 71–72 of the *Discussion Paper*). The practices at issue would fit under either (a) or (b) of that subsection. Action by Canada without prior reference to the GATT would put the onus of laying a complaint under Article XXIII on other countries, not on Canada. Obviously it would provide a remedy much sooner.

Fourthly, overhanging the views on these issues set out in the EEMAC and CGE submissions, and the suggestions set out above, is the critical problem for Canadians: what measures of protection for producers in central Canada will be acceptable to users in other parts of Canada. The pre–Kennedy Round anti-dumping system of Canada was ineffective in relation to the dumping of the sort of goods at issue here because, as the law was written, the dumping was deemed to take place only when the actual importation was made. There was little value in seeking to impose anti-dumping duty on a provincial utility when the import took place, given that the injury has long since occurred, and that the anti-dumping duty would have no effect on the decision to purchase. It was in response to representations by CGE that the law was drafted to provide that dumping was deemed to have taken place, not at the time of *import* but at the time of *sale*. But nonetheless, the anti-dumping system legislated in 1968 has not stopped provincial utilities in parts of Canada where the capital equipment is not produced accepting tenders at dumped prices. One

might conclude that the various parts of the system have been operated so as to reduce to a minimum the prospect of a provincial utility having to pay an anti-dumping duty, presumably on the unstated premise that the proper use of the anti-dumping system, consistent with Canada's rights and obligations, is more than could be politically tolerated within Canada. It is not clear to me that this unstated premise is correct. With the major reductions in tariffs agreed by Canada in the Kennedy Round and the Tokyo Round, the burden of the tariff on the regions of Canada outside central Canada has been reduced. Moreover, there are numerous tariff provisions in force that aid producers in those regions, in terms of reducing their costs, and there are tariffs imposed on users in other parts of Canada of products produced in these other regions. Given that there has been a switch from reliance on tariff protection to reliance on protection against unfair competition, the question is whether the people of Canada outside central Canada would continue to maintain that they must have an unlimited right to supplies sold unfairly, that is, dumped, and, moreover, by producers that enjoy infinite protection against Canadian producers. The tariff issue has traditionally been a regionally divisive issue; should we assume that issue of protection against competition will be equally divisive?

I believe the dumping of certain types of capital equipment is so injurious to Canadian producers, and that the damage done to Canadian interests by the absolute procurement preferences in other countries is such that the government should deal with the matter as a major issue of economic policy. It may be that there should be a substantive formal public inquiry conducted in which the various assumed regional interests could be examined. Possibly the representatives of other countries and producers in other countries would explain why they feel that they are entitled access to the Canadian market while denying Canadian producers their GATT rights in their domestic markets. However Canada deals with the issue, it is clear that unless Canada does, there is little prospect of any international action to deal with the issue.

It may well be asked, why has Canada not tackled the issue, at least in the GATT, before now? There are several reasons. One was that a possible procurement code was being discussed in the OECD in Paris for some years; this held out the hope of a negotiated solution. Then for four years there was the prospect that agreement could be reached regarding procurement in this sector in the Tokyo Round. Moreover, many procurement experts failed to realize that the procurement exemption of Article III of the GATT did not extend to heavy electrical equipment.

Now that the Tokyo Round has failed to deal with this issue, perhaps we should deal with the issue directly. Of course, in the process one

shall have to consider procurement preferences in this area accorded by Canadian governments. Effective action against dumped supplies from restricted overseas markets may make such procurement preferences as are applied in Canada seem unnecessary.

There is a final point on this issue that I wish to put to the Subcommittee. None of what I have suggested above is inconsistent with proposals I have made elsewhere in a bilateral procurement agreement between Canada and the United States, open to others on a basis of reciprocity.

Administrating the Canadian System

I am reluctant, as an ex-official with no administrative responsibilities, to express views on how the Canadian import system should be administered. However, as I had a hand in devising the present system, and as other submissions to the Subcommittee address this issue, I wish to offer some comments.

Leaving aside, for the moment, the important role of officials of the Department of National Revenue, the present Canadian administrative structure is haphazard and wasteful. It has long seemed to me that the Tariff Board should not be asked to carry out two quite different functions. On questions of sales tax, customs valuation, classification, margin of dumping, and so on, the Board is required to perform as an administrative tribunal or court and requires legal expertise for this purpose. It also carries out economic functions — in terms of advising how tariff rates and structures should be altered, applications for "safeguard" procedure under the Canadian General Preferential System, and so forth. There are primarily practical economic functions, in much of which it is required to assess the impact of imports. It would have seemed sensible to assign the function of assessing the impact of dumped imports to the Tariff Board rather than to create a new and separate body. However, the decision to establish the Anti-dumping Tribunal in 1968 was made on presentational and broadly political grounds that no longer apply. Again, the impact of imports for two particular sectors, textiles and clothing, are assessed by yet another board, established as a separate body for assumed political reasons that may be no longer relevant.

If one looks at U.S. experience, one must conclude that there is a great deal to be said for putting the legal functions of the Tariff Board into some sort of court of international trade, choosing lawyers as members, and providing it with legally trained staff. I say "some sort of court" because one of the issues to be examined would be whether appeals from the Import Tribunal on matters of law should go to the Federal Court, as at present, or to the international trade court. (Recently, the U.S. Court of International Trade threw out an injury finding of the International Trade Commission regarding the dumping of sugar by Canadian producers.)

If some such court were established, it would be for consideration whether the remaining function of the Tariff Board, and the functions of the Import Tribunal and of the Textile and Clothing Board should not all be assigned to an amalgamated body. An amalgamated single body would offer important staffing advantages in that the range of responsibilities would offer meaningful career opportunities that are now lacking in the three existing bodies. There would be important economies in staffing, too, including a reduction in the number of posts to be filled by order-in-council appointments. I believe that we cannot afford and do not have the people, either for board membership or for staffing, to run three boards effectively. Thus I would argue for *one* economic body, very much along the lines of the U.S. International Trade Commission.

Other submissions have argued for more resources and more status for the group in National Revenue responsible for investigating dumping (and subsidization). It seems to me that the case is persuasive. The question is how to achieve this. In this connection one should note that the decision to assign certain functions to National Revenue in 1968 was made basically on the ground that this was necessary to get the new system into operation. However, U.K. experience, EEC experience, U.S. experience, all show that a group of officials who are not part of the customs service can deal with investigations into dumping. Moreover, there is no particular reason why the investigation into dumping and the investigation into injury should not be handled by the same group of people at the staff level. I would therefore suggest that the Subcommittee might consider assigning the function of investigating complaints of dumping to a unit or the staff of an amalgamated tribunal. Such an arrangement would facilitate adoption of the device of a "preliminary inquiry" on injury. It would also make it easier to give the investigative officials the status and resources they should have now that the emphasis in the Canadian commercial policy system is switching from the tariff mechanism to dealing with *unfair* competition from imports.

Glossary

ASP	American Selling Price
CGE	Canadian General Electric
DISC	Domestic International Sales Corporation
EEC	European Economic Community
EEMAC	Electrical and Electronic Manufacturers Association of Canada
GATT	General Agreement on Tariffs and Trade
ITC	U.S. International Trade Commission
MFA	Multi-Fibre Arrangement
TPM	Trigger Price Mechanism

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